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OBSERVATIONS

UPON

THE STATUTES,

CHIEFLY

THE MORE ANCIENT,

FROM

MAGNA CHARTA

TO

The Twenty-first of James the First, Ch. xxvii.

WITH

AN APPENDIX,

BEING

A Proposal for new modelling the Statutes.

“—— tabulas peccare vetantes,

“ Quas bis quinque viri sanxerunt.”

Hox.

“ Nam tametsi non integras contineant politicarum descriptiones, habent tamen

“ memorabilia quædam instituta, nec in vulgus nota, quæ quidem talia sunt,

“ ut, qui ea recte adhibere voluerit, sæpe in consiliis, in legibus, in judiciis

“ commodare potuerit.” Nich. Cragius in præf. ad Heraclem Pontici de politiis libellum. —

THE SECOND EDITION,

With CORRECTIONS and ADDITIONS.

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M,DCCLXVII.

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“Alienæ gentis legibus, ad exercitium utilitatis imbuti et permittimus, et optamus; ad negotiorum vero discussionem, et resultamus, et prohibemus.” Inter Leges Wisigothorum. Lindenbrog.

“ Bien sofremos, e queremos que todo ome sepa otras leyes, por ser mas enten-
 “ didos los omes, e mas sabiduria; mas no queremos, que ninguno por ellas ra-
 “ zone, ni juque, mas todos los pleytos sean juzgados, por las leys deste libro,
 “ que nos damos a nuestro pueblo, que mandamos guardar.” Inter Leges Al-
 “ phonfi Sapientis, Fuero Real de España, lib. i. titl. 6. Salamanca, 1569.

" Il est tems de chercher a present dans l'importante affaire du gouvernement, et des loix, de nouveaux traits, qui nous peignent au naturel le peuple dont nous etudions l'histoire." Hist. de Dannemarc, par Mallet. tom. i. p. 100. Copenhagen, 1755.

" Qui ignore les loix et coustumes de son pais, est digne d'estre reputé au nom
" bre des estrangers." Pref. aux Ordinances Royales. Paris, 1552.



the States.

1. "Kommis der Provinz von Hannover."

THE SECOND EDITION

With Corbett and A. D. Johnston.

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P R E F A C E.

IT is believed that few lawyers, or historians, have perused the Statute Book in a regular course of reading: if a particular act of parliament hath been necessarily examined into, either by the one or the other, the research hath probably gone no further than to that particular statute, or, at most, to those only which relate to the same subject matter. It must be admitted, that this would not be the best method of illustrating, or explaining, any other author (for the successive parliaments must be considered in this light): and it hath always been allowed, that the best comment upon any literary work is other parts of the same work.

I must own, that I did not read the Statute-Book with attention, from the motive I have above alluded to; my only object was to take notice of such acts of parliament, from which no good effects could be expected; and which, on the contrary, might contribute to the vexation and oppression of the subject, as well as to the unnecessary swelling the collection of statutes.

If it be asked what purpose this could answer, besides the satisfaction of my own private curiosity, I must admit, that I had a view of laying a proposal before the publick, that such unnecessary and prejudicial statutes might (with proper precautions) be entirely repealed, as well as that acts, which related to the same subject, might be reduced to one uniform and consistent law [a].

[a] See a proposal with regard to this in the Appendix.

This very thought or idea may, perhaps, by some be considered as highly presumptuous; but it would have been still more so, if I had not given to each statute a diligent and careful perusal.

At the same time that many such statutes occurred in every reign, other observations naturally arose. It appeared that the old acts of parliament were (as far as they went) the very best materials for an English history; and that they were likewise strongly descriptive of the manners of the times. It will be found, that the inhabitants of this country were, three or four centuries ago, guilty of many crimes, which we have at present scarcely an idea of; and that we are not indebted to them (at least in their capacity of legislators) so much as hath been generally supposed. At the same time we owe much to them, as there were greater struggles for a constitutional freedom, than in any other country of Europe during the same period. This, however, should not rest upon assertion merely, without having examined the materials proper for forming a comparative judgment; I have, therefore, looked into the *Ordinances* of most countries of Europe, during the thirteenth and three following centuries [b] (to which time I mean to confine my observations); and it will appear, that our laws are much superior. I have particularly examined the Scotch acts of parliament, since the year 1424 [c],

[b] These *Ordinances* are likewise frequently expository of our Statutes, especially when they happen to have been made nearly at the same time.

[c] The collection of Statutes, published by Sir Thomas Murray of Glendook, clerk of the council in 1681, begins with the first year of James the First of Scotland. The first edition of them, however, was by Liprevick; and from the black character in which they were printed, they were called *Acta Nigra*. Skene afterwards, who was clerk of the parliament, and hath written a Glossary to explain some of the antiquated words, continued the *Black Acts* to the year 1597: traces, however, are to be found of much earlier laws, in *Hector Boethius*, and other chroniclers and historians.

which,

P R E F A C E.

which, though continued regularly from one reign to another, have been most unaccountably neglected by all our lawyers and historians. It is well known, that the preface and introduction to their *Regiam Majestatem*, as well as many other parts of that ancient book of the Scotch law, are the same with our *Glanvil*; and though formerly there were great wars and animosities between the two nations, yet, from their vicinity, there was, to a certain degree, a communication of laws and manners. The learned *Craig* supposes, that the English law is the foundation of the Scotch law: other writers upon the Scotch law (particularly *Bruce*) have denied this, and supposed the English to be derived from the Scotch; but (be this as it may) the very point in litigation necessarily supposes an agreement, and connexion.

As for the opinion of English writers upon this head, I have not happened to meet with one, who seems ever to have looked into the Scotch law; and it is very particular, that even in *Calvin's case* [d] when the judges might have paid their court so well to James the First, by shewing a connexion between the two laws, there is not even an allusion to such an agreement. This is the more extraordinary, as this king, in one of his speeches to the parliament, says, “ all the law of Scotland for
“ tenures, wards, liveries, and seignores is drawn from
“ England, and James the First of Scotland being edu-
“ cated in England, brought the English laws in a
“ written hand [e].”

With

[d] 7 Cok. Rep. p. 1.

[e] King James's Works, p. 523. Lord Bacon likewise had prepared many tracts to enforce the necessity of an union between England and Scotland; and yet I do not find any observation or argument drawn from the laws of the two countries agreeing with each other. See vol. ii. of his Works. Sir Bulstrode Whitelock indeed, in his commentary on the writ for choosing members of parliament, which was published in May of the present year (viz. 1766), alludes shortly to this agreement between the laws of the two nations, vol. ii. p. 272. and it is likewise

transiently

With regard to the laws of the other parts of the world, I have chiefly confined my observations, in illustrating of any of the statutes, to those of the more northern parts of Europe. If some of the inhabitants of this island are descended from the *Angles*, or *Saxons*, the ancient customs and laws of these people must have been adopted by us: if others are of *Danish* extraction, the laws of *Denmark*, *Sweden*, and *Norway*, must likewise be supposed to bear a great affinity to our's.

The same observation holds equally with regard to the ancient laws of Normandy, and other provinces of France; and if it is contended, that some of our laws and customs are merely of *British* origin, the laws of *Hoel Dda* must be consulted, which are the most regular collection and system of ancient laws that are any where extant [f].

The following observations are, therefore, the result of a very attentive reading, of whatever materials might most contribute to the more fully understanding the statutes; and notwithstanding great diligence hath not been wanting in procuring those materials, as well as in the perusal of them, I yet fear that I must beg a more than common share of indulgence from the reader.

I can hardly flatter myself, that any one will give a regular perusal to what consists of such miscellaneous matter: I will only request that those who may look

transiently mentioned in the *Reliquiæ Spelmanianæ*, p. 27. Sir Edward Coke also takes notice of the connexion between the two laws in his 4th Institute, which was however a posthumous work, and written probably after the decision in Calvin's case. It should seem that none of these writers had ever looked into the Scotch acts of parliament, but had only compared the *Regiam Majestatem* and *Glanvil* in some particulars.

[f] Perhaps *les Affises de Jerusalem* may be excepted; for an account of which, see observations on the twenty-seventh of Henry the Eighth.

into

into what relates to any particular statute, would afterwards cast their eye upon the Index, as, perhaps, it may furnish a reference to what may tend to illustrate the same point.

It may be proper likewise to mention, that, in some instances, the reading the statute itself may be necessary for the more clearly understanding the *Observations*. If it be said, that in such instance the statute itself should have been printed, the answer is, that this would have greatly swelled the book; and as most of those, who will ever look into these remarks, will probably be of the profession of the law, it is needless to say, that every lawyer must have some edition of the Statutes in his study: in order likewise to keep the work within due bounds, I have scarcely, in any instance, translated any citation or authority.

As some few of the *Observations* are verbal, it may not be improper to inform the reader, that the edition of the Statutes, which I have generally made use of, is that of Mr. *Cay*. I do not by this pretend to enter into the comparative merit of this and the latter editions; but am persuaded, from the great learning and accuracy of the editor, that it will not easily be rendered more perfect, except by the addition of the Statutes of the present reign. I have likewise very frequent occasion to support what I have advanced, by citations from *Rymer's Fœdera*; it may not be improper, therefore, to observe that the edition I have made use of, is that printed, at the *Hague* in 1745.. As for other authorities, when they are taken from books which are not easily to be procured, I have generally mentioned the place, and time, when such work was printed, in a note subjoined to such authority: having omitted this in some few instances, I had thought of prefixing a list of the authors cited (which hath not been uncommonly practised): I have, however, been deterred from this, by its being condemned by many, as ostentatious.

The favourable reception which these Observations have received from the publick, hath made it necessary to publish a second edition. I fear the former impression bears but too strong marks of its not having been originally written with a view to publication; the unmerited indulgence however to its defects, requires that I should now endeavour to make it as little inaccurate, as I am capable of. I have therefore made considerable additions, as well as corrections, some of which I am obliged to learned and ingenious friends for, who will not permit me to have the honour of thanking them more particularly.

May 30, 1766.

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THE STATUTES.

OBSERVATIONS

ON

THE STATUTES

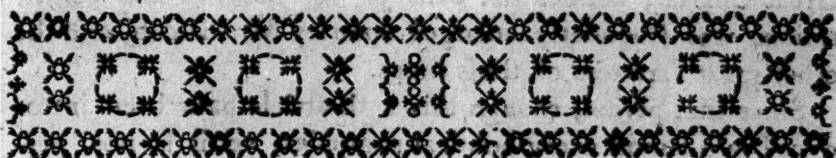
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M A G N A C H A R T A,

9 Hen. III. A. D. 1225.

BEFORE any observation or comment is made upon the particular articles of Magna Charta, it may not be improper to give a general reference to those writers who have professedly considered this most ancient of our statutes, which may at present be enforced.

The great Charter and its regulations is sometimes transiently mentioned by *Bracton*, *Fleta*, and *Briton*; but I do not recollect that it is ever much dwelt upon, or commended, by any of these ancient writers on our law [a]. On the other hand, the *Mirror of justices* (which was written either in the reign of Edward the First, or Edward the Second) represents it to be very defective in many of the articles [b], and hath an express chapter *sur les defautes de la Grande Chartre*.

It is unnecessary to mention, that Sir Edward Coke hath written such a comment in his second Institute. It would be the highest presumption in any one to pretend to add to what this great Lawyer hath advanced, if his observations did not happen to be made with a view totally different, and to arise from different materials. It seems almost as unnecessary to

[a] The preface to *Fleta* indeed makes mention of the *Charta Libertatum Anglie, et Statuta*, forming the first book, or division, of that work: this however seems to have been lost, as it begins to treat *de personis*. As for *Glanville*, he is supposed to have written before the *Great Charter*.

[b] *Mirr. des just.* p. 315, et seq.

say, that, during the troubles, the 29th article [c] of this Great Charter, deemed the basis of our liberties and constitution, was frequently enlarged upon by Mr. Selden, and the other great Lawyers of those times.

Since that period, though this 29th article hath been introduced into almost every political pamphlet, yet it is not, perhaps, worth while to refer the Reader to any thing which hath since been published [d], till the introductory discourse by the learned and ingenious Mr. Blackstone, prefixed to his publication of the Great Charter, and Charter of the Forest. In the fourth page of that introduction Mr. Blackstone says, that what the Reader is to expect from him is, *An authentic and correct edition of the Great Charter, and Charter of the Forest*. This the public hath received from his hand, and great is his merit with the constitutional Lawyer, the Historian, and the Antiquary: it appears however, from what I have said in my Preface, that this no way interferes with, but rather promotes, the plan I have proposed to myself in these remarks. Mr. Blackstone hath procured and collated all the originals of the Charters which he could collect; I have only to add to this, that, besides the common editions of the Statutes, all of which necessarily include Magna Charta, there is an edition of it by Pynson, in 1519, another by Redman, in 14 Hen. VIII; and another by Berthlet in 1532; besides its being inserted in many of the old Chronicles. These cannot certainly be compared to originals, but may possibly deserve to be collated.

Having said thus much with regard to those who have already written with a view to explain or illustrate Magna Charta, it may not be improper to consider what was the intention of the Barons in this collection of Laws [e], as far as it can be inferred from the Laws themselves, or the history of the times. It is well known, that in the exposition of a statute, this is the leading clew in the construction to be

[c] Nullus liber homo, etc.

[d] Nath. Bacon hath written a comment upon some few of the ancient Statutes. I shall rely upon the greatest authority in saying, that he is a *partial, and systematical writer on the constitution*. Confid. on the Law of Forf. p. 108.

[e] Such a collection of laws is called, by Baluzius, a *Capitularium*, a term, which I shall have frequently occasion to make use of. See his Preface to the *Capitularia Regum Francorum*.

made; and I cannot therefore but with diffidence contend that it was not proposed to renew the Saxon Law, or Laws of Edward the Confessor [f]; though this hath been so often advanced, and insisted upon. If this had been the intention, these Laws of Edward the Confessor would have been expressly mentioned; and there is not one Saxon term for any thing that relates to feudal tenures, which are the great objects of many of the chapters. There was, on the other hand, the strongest inducement to the Barons to wish the continuance of the Norman and feudal law introduced with the Conquest. Half the kingdom was held by feudal tenures under them: they were themselves the Judges (having what the French call *Haute* and *Basse Justice*) They expounded their own laws, the pleadings of which were likewise in their own tongue. The native English therefore, or their descendants, could not receive justice from courts so constituted, and which gave the Barons at the same time every kind of influence and power. It appears by the last chapter of the Charter, that all the attesting witnesses not in holy orders (as for the Bishops, Abbots, and Priors, they sign by their christian names, and that of their bishopric or priory) were of Norman extraction. Whence then could arise the inducement to make it an express article that the Saxon Laws should be restored? The introducing the feudal law, on the other hand, with its attendant vassalage, was insisted upon by their ancestors, who had incurred so considerable an expence and risque, when they embarked with William the First in his enterprise. Such adventurers had a right to claim their own terms, as we find likewise to be the case with the first adventurers in the conquest of Ireland, and the *Lacins* and *Mortimers*, who, as Lords Marchers, were employed to extend the English dominion in the adjacent counties of Wales. In short, it is probable, that having every thing in their power, they would insist upon restoring a law by which every grant made to their ancestors (and from which their own power and influence at that time arose) should be rendered doubtful, or at least stripped of its greatest advantages, and emoluments. I will not anticipate any observations upon the different chap-

[f] "Non quas tulit Sanctus Edwardus, sed quas observavit," says Tyrrell.

ters of Magna Charta any further, than by saying it will most fully appear, to any one who examines all the articles of this Charter, that the descendants of these Norman Barons were by no means forgetful of their own peculiar interests on this occasion; and therefore could never mean to abolish the Norman and feudal law, which was in every respect so highly advantageous to them.

MAGNA CHARTA, though it is printed in all editions of the statutes as a law made in the ninth year of Henry the Third, is, more properly, a transcript from the Parliament Roll of 25 Edw. I. who then confirmed it, after reciting the Magna Charta of his father by *Insuperimus* [g]. This confirmation [h] was occasioned by Edward's having (from his great necessities) rifled all the monasteries in that very year: *fecit omnia regni monasteria perscrutari, et pecuniam inventam Londoniis assortari, facisque caria et lanas pascuere* [i]. There is a record in Rymer, that relates to this confirmation by Edward the First, and which I shall here insert.

“ De Octava levanda et Magna Charta *confirmata eandem confirmanda*, anno 25 Edw. I. Claus. 25 Edw. I.

“ Edwardus Dei gratia, Rex Angliæ, dominus Hiberniæ,
 “ & Dux Aquitanie, Vicecomitibus Bedf. et Bucks salutem—
 “ Quia, in relevationem omnium incolarum et populi regni
 “ nostri, pro octava omnium bonorum singulorum laicorum
 “ per totum idem regnum pro urgentissima nunc dicti regni
 “ contra Gallicos necessitate levanda, concessimus pro nobis et
 “ hæredibus nostris confirmari et firmiter teneri facere Mag-
 “ nam Chartam de libertatibus Angliæ, et chartam de liberta-
 “ tibus Forestæ; et concedere omnibus et singulis ejusdem
 “ regni literas nostras patentes, quod dictæ octavæ levatio non
 “ cedet eisdem in præjudicium, servitutem, exhereditationem,

[g] The collectors of French records style this kind of exemplification a *Vidimus*.

[h] It is attested by Edward the Second, then Prince of Wales, and who was but thirteen years of age; Edward himself was then at Ghent, in Flanders. should imagine, that the attestation by the Prince of Wales (being of so tender years) was to take away the pretence of disputing the confirmation when he came to the throne, as it was at that time by no means a settled point, whether the statutes of the predecessor bound the successor. See p. 118.

[i] Camden's Angl. Norm. p. 165.

MAGNA CHARTA.

" usum, vel consuetudinem in futurum [1]: Tibi precipimus.
 " quod sine dilatione aliqua quatuor de probioribus et legaliori-
 " bus militibus comitatum tuorum, videlicet de quolibet co-
 " mitatu duos, eligi, -- et eos plenam potestatem pro ipsis, et tota
 " communitate dictorum comitatum habentes, ad Edwardum
 " filium nostrum carissimum, tenentem in Anglia locum nos-
 " trum, venire facias. Ita quod sint London' ad eundem fili-
 " um nostrum modis omnibus in octavis Sancti Michaelis
 " proximo futuri ad ultimum, chartas super confirmatione
 " nostra chartarum prædictarum, et literas nostras supra præ-
 " dicta concessione pro ipsa communitate in forma prædicta
 " accepturi, et facturi ulterius quod per dictum filium et con-
 " cilium nostrum ibidem fuerit ordinatum. Teste Edwardo
 " filio nostro, apud Sanctum Paulum, London 15 die Septem-
 " bris, anno regni nostri 25." Then follow, on the back,
 the names of those who were deputed by the counties of Bedford
 and Buckingham, [1]. Edward the First himself afterwards
 sealed this confirmation, with the Great Seal of England, at
 Ghent, on the 5th of November.

Magna Charta consists of Thirty-seven Chapters, which
 relate to things of so different a nature, that it is impossible to
 reduce the observations, by way of comment upon it to any
 regular order or connexion. I shall therefore introduce any
 remark I may have to make, by only printing so much of a
 chapter (by way of text) as may give occasion to the expla-
 natory remarks.

C A P. I.

*INPRIMIS concessimus Deo, quod ecclesia Anglicana libera
 sit, et habeat omnia jura sua integra, et libertates suas illasas.* It
 is an observation of Sir G. Mackenzie [m], that every reign
 of the ancient kings of Scotland begins with a provision of
 a similar nature in favour of the liberties of the church.
 The same may be observed with regard to almost all the com-
 pilations of ancient laws. The reason is obvious. I should

[1] This part of the record fully explains the fifth chapter of the 25 Edw. 1.
 [See the Remarks on that Statute.]

[1] Rymes, vol. i. par. iii. p. 189. Hague edit. 1745.

[m] In his Observations on the Scotch Statutes.

suppose, that the liberties of the *English Church* hereby insisted upon were chiefly its immunities from the papal jurisdiction, which had been so far extended in the reign of Henry's predecessor. Thus likewise the French, to this day, insist upon the liberties of the *Gallican Church* in opposition to the pope, relative to which *du Tillet* compiled a treatise from the *French* archives in 1602. The laborious *Prynne* hath likewise collected three large Folios of Records to prove these immunities of the English church; the greatest part of the printed copies of his second volume was destroyed by the fire of London, so that it is not only scarce, but sold at an immense price: it contains however many curious, and valuable records.

C A P. IV.

CUSTOS terre hujusmodi heredis non capiat de terra heredis nisi rationabiles exitus, et hoc sine destructione et vasto hominum, et rerum.] From the expression of *vasto hominum et rerum* it appears, that the villains who held by serylle tenures were considered as so many negroes in a sugar plantation.

There is in the *Dialogus de Scaccario*, written by *Fitz-Niel*, bishop of London, and treasurer in the reign of Henry the Second, a very particular description of what should be deemed vastum, or waste. “*Si nemora sic excisa sint, ut subsistens quis in vix exstante succisæ arboris stipite circumspiciens quinque succisas viderit, vastum reputabitur [n].*” This dialogue hath uncommon merit as a literary production for those times.

There is likewise a very singular description of what shall be deemed waste in the Collection of the laws of *Ina*, in the *Chronicle of Joannes Brompton*, published amongst the *Decem Scriptorum*. “*Si quis lignum truncaverit sub quo triginta porci stare possint, xxx sol. emendet ad vitam.*”

Waste is thus described in an *Ordonnance* of *Philip le Bel*, in the year 1302. “*Ne facent aucun gaste, et s’il y a aucun arbre, qui ait este garde pour sa beaulte, ou pour substen-*

[n] P. 29. edit. Lond. 1711.

"tation de Maisons, qu'il soit encore garde [o]," which does honour to the good taste of those times [p].

CAP. VII.

VIDUA post mortem mariti sui statim et sine difficultate aliqua habeat maritagium suum, nec aliquid det pro dote sua, et maneat in capitali mesuagio mariti sui per quadraginta dies post obitum mariti sui.] The Danish and Swedish laws [q] speak of the *annus luctus*, which is expected from the widow, and during which she hath particular exemptions and privileges, and Tacitus observes, that, amongst the ancient Germans, it was esteemed *fæminis lugere honestum; viris meminisse*. By the laws of Canute, if the wife marries within the year, she loses her dower; and by the ancient laws of Spain, "if the wife, after the death of her husband, marries again, or is guilty of adultery during the husband's life, she forfeits half her effects to the children of the first marriage [r]."

There was an absolute necessity for the provision of dower for the widow, as women at this time had no personal fortune to entitle them to a jointure by way of bargain on the marriage. If they had indeed any small portion of this sort, it was contrary to the customs and laws of the Northern nations that the husband should receive it. "Apud Gothos non mulier viro, sed vir mulieri dotem assignat, ne conjux ob magnitudinem dotis insolescens, aliquando ex placida consorte proterva evadat, atque in maritum dominari con-

[o] "Sciendum autem est eos qui arbores, et maxime vites ceciderint, tanquam latrones puniri." Caius in Duod. Tab.

It appears by a speech of Lord Bacon's against the abuses of purveyors, that those who were to purvey timber for the king (even so late as the reign of James the First), used to extort large sums of money by threatening that they would otherwise fell trees, which grew in avenues, or near the mansion-house. Vol. ii. p. 150. edit. 1765.

[p] Ordonn. Royales, p. i. (Paris 1586.)

[q] Jus Danicum, Hafniæ, 1698. Leges Sueciæ, Holmiæ, 1743.

[r] "Si la moyer depost la morte del marido si casa con otro, o fizier adulterio, la meatad di todas ses cosas receban los fijos dela e del primer marido." Fuero Jusgo, lib. iii. p. 189. This collection of laws, called the *Fuero Jusgo*, is perhaps the most ancient in Europe, as those of Lindenbrogue and Baluzius go no further back (except in some few instances) than the time of Charlemagne; whereas Villadiego, in his Preface to the *Fuero Jusgo*, printed at Madrid in 1600, says, that some of these laws were then of more than a thousand years antiquity.

"tendat

"tendat [s]." And it may not be improper here to observe, that the English would more probably borrow a law or institution from the Goths [t] and Swedes, than any other of the Northern nations, as there was a perpetual and constant alliance between the two nations, in opposition to the common enemy the Danes. Thus Olaus Magnus, in another part of his history, observes. "Nunquam enim legi Gothorum
 "aut Sueonum reges sponte Angliæ bellum intulisse, sed
 "quandam cognatam amicitiam contra Danorum violenti-
 "am et arma conservasse [u]." It must be admitted however, that the Danish law prevailed on the Eastern coast of England, and particularly Norfolk, Suffolk, and Cambridgeshire [w]. One of the reasons for the widow continuing forty days within the capital messuage was to prevent a supposititious child, which deceit was not uncommonly practised in these times, as may be inferred from the old writ *De ventre inspiciendo*. Thus likewise by the laws of Hoel Dda, there is still a greater anxiety to prevent this imposition, "Fœmina, quæ
 "se prægnantem affirmaverit tempore mortis mariti sui, in
 "domo ejus manebit, donec constiterit utrum prægnans fuerit
 "vel non; et tunc, si non fuerit prægnans, mulctam solvat
 "trium vaccarum, et domum et fundum hæredi relinquat [x]."

It is the fashion at present to laugh at what is called *Bishop Burnet's warming-pan-story*; it appears however, by Lord Clarendon's Journal [y] that Queen Anne, then princess of Denmark, gave credit to this report: and this imposition was actually carried into execution (according to some of the French chroniclers) by one of the ancient queens of France.

[t] Olaus Magn. Goth. Hist. p. 235.

[u] The laws of *Erick*, who lived in the twelfth century, were held in as great veneration by the ancient Swedes and Goths, as our laws of Edward the Confessor by the English. *Olaus* says, "Ad quas etiam nostris temporibus" (viz. the sixteenth century) "injuste oppressi perinde atque unicum innocentie suæ presidium
 "confugiunt."

[w] P. 164.

[x] Script. post Bedam, 607. See also Duck, p. 176.

[y] P. 78. See also the laws of Robert the First, p. 34. Reg. Maj. And for many regulations to prevent supposititious children, see *Fuer. de Espan.* and likewise *Pradilla's Suma de las leyes penales* (printed at Madrid 1639), where the midwives are ordered to be whipped.

[z] Published by Dr. Powney.

C A P. XI.

COMMUNIA placita non sequantur curiam nostram, sed teneantur in aliquo loco certo. The best comment on this

chapter of Magna Charta, seems to be the parliamentary exposition by 28 Edw. I. ch. 4. and 5. which shortly says, that Common Pleas [z] should not be held in the Exchequer contrary to the form of the Great Charter. Now this is the only mention made where Common Pleas are to be determined throughout Magna Charta, and consequently it should seem that the legislature meant to prevent the undue influence of the Crown in the court of Exchequer, which probably was then a mere court of Revenue [a].

Prynne [b] cites a writ at length of 6 Edw. III. by which that king fixes the court of Common Pleas in Ireland to the city of Dublin, in the same manner that it is fixed by this chapter of Magna Charta.

It appears likewise, by the *Annals of Waverly*, that the Judges of the King's Bench and Barons of the Exchequer attended Edward the First to Shrewsbury in one of his expeditions into Wales, and continued there a considerable time: the judges of the Common Pleas therefore continuing at Westminster, in consequence of this article of Magna Charta, must have been attended with great benefit to the subject, whose suit must have otherwise been suspended, or prosecuted with an unnecessary and extraordinary expence at Shrewsbury, or some perhaps more distant place from the capital.

C A P. XIV.

LIBER homo non amercietur pro parvo delicto, nisi secundum modum ipsius delicti; et pro magno delicto, secundum magnitudinem delicti, salvo contentamento suo: et villanus alterius

[z] Lord Bacon supposes that the Court of Common Pleas was erected in the reign of Henry the Third. Vol. ii. p. 378.

[a] It appears by later statutes, that the Barons of the Exchequer were not considered in every respect as bearing the same offices with the Justices of the King's Bench, and Common Pleas. 27 Edw. I. ch. ii. 3 Edw. I. ch. xlv.

[b] Animadversions on the fourth Inst. p. 52.

quam noster eodem modo amercietur, salvo wanagio suo.] Selden, in his Table talk, says, that the word *contenementum* signifies the same with countenance, as used by the country people, when, meaning to receive a person with hospitality, they say, *I will shew you the best countenance, &c.* So that the meaning of Magna Charta is, that a man shall not be so fined, but that he may be able to give his neighbour good entertainment. Lord Bacon uses the word *countenance* in the same sense: "There is never a gentleman that has over-reached himself in expence, and thereby must abate his *countenance*, but he will rather travel, and do it abroad than at home [c]." A Spaniard, on the other hand, insists upon his horse or arms not being taken in execution, "*Ni les sean tomadas por deudas sus armas, ni cavallos [d].*"

The *Wanagium* here mentioned, or what is necessary for the labourer and farmer for the cultivation of his land, hath always been favoured by the laws of most countries. Thus, by the laws of Provence. "Item que per inquisition ou autra causa, neguna persona de Provença non deia esse agaida en armes, cavale, buous, ou autras bestias d'arayre, si non en defaltiment d'autres bens [e]." The pointing *Averia Caruca* is even criminal by the law of Scotland. The Chronicle of St. Albans explains the necessity there was for moderating both amercements and distresses. The Commons complained, "quod rex (scil. Henricus) quicquid habuerint in esculentis et poculentis rapuit. Rusticorum enim equos, bigas, vina, victualia ad libitum cepit." The representations against this oppression, however, afterwards occasioned the king's giving a charge in person to the Barons of the Exchequer, "Nullus Rusticus distringatur pro

[c] Works, 4to. vol. ii. p. 175.

[d] Las Leyes de Navarra, p. 226. collected and printed at Pampeluna, 1614.

[e] Du Moulin, vol. ii. p. 1245. As this citation from Du Moulin is in the Basque language, or the language spoken by the inhabitants of Gascony, and the other Southern provinces of France, I shall here subjoin a translation of it, as it consists of a mixture of French and Spanish. "Also that by inquisition (Ferretier's Dictionnaire de droit thus explains this word, "Inquisition est la recherche que le juge fait des crimes qui sont venus a sa connoissance par commune renommee, sans qu'il y ait aucun denonciateur") or on any other account, no inhabitant of Provence shall be aggrieved (agaida used corruptly for *aggraviada*) in his arms, horses, oxen, or other beasts used for ploughing, by their being distrained, except they have no other goods." Du Moulin is generally styled the French Papinian. Giapone however says, that he is a very inaccurate writer. Ister, di Nap.

“debitis domini sui, quamdiu dominus habuerit per quod
 “distringi possit. Inquirendum est etiam qualiter magnates
 “se gerunt versus homines suos; at si invenerint ipsos trans-
 “gredientes, corrigant quatenus poterint [f].” From this
 it appears, that the tenant was not only oppressed for his
 own debts, but likewise for those of his Lord. The town of
 Aylebury held lands by the service of keeping the beasts dis-
 trained for the king's debts; which shews that these distresses
 were very frequent, and therefore probably often oppres-
 sive. The manor of Byker, in Northumberland, was likewise
 held by the same tenure. The law with regard to amerce-
 ments is laid down by *Bracton* in the words used in this 14th
 chapter of *Magna Charta*, without taking notice of its de-
 pending upon this statute, which seems to prove that it is on-
 ly declaratory of the Common Law.

C A P. XVIII.

SI aliquis tenens de nobis laicum feodum moriatur, et Vicecomes vel Ballivus noster ostendat litteras nostras patentes de summonitione nostra de debito quod defunctus nobis debuit, liceat Vicecomiti vel Ballivo nostro attachiare et imbreviare omnia bona et catalla defuncti. Ita tamen quod nichil inde amoveatur, donec persolvatur nobis debitum quod clarum fuerit As Prynne's collection of records is so voluminous as not to be read by every lawyer, or indeed found in his study, I shall insert his Comment on this eighteenth chapter of *Magna charta* in his own words, with the records he cites in support of what he hath advanced. ‘Walter de Merton bishop of Rochester, the
 ‘Kings Chancellor, having made his will by the king's licence, and owing several debts to the king and queen at the
 ‘time of his death, the king thereupon seized all his goods
 ‘and chattels, till his executors had put in good security in
 ‘the Exchequer to satisfy these debts to him and his queen;
 ‘which done, he issued writs to restore his goods to his
 ‘executors, granted them protections, and summoned all
 ‘indebted to him into the Exchequer, speedily to pay the

[f] Prynne's Rec. vol. iii. in pref.

debts they owed, to enable his executors to perform his will by several writs and patents; which because they more clearly expound the statute of Magna Charta, cap. 18. then Sir Edward Coke's institutes and exposition thereof, I shall here insert for the benefit of those of my profession. "Rex Vic. Suthf. salutem. Quia bonæ memoriæ W. nuper Rossensis episcopus jam defunctus nobis et karissimæ consorti nostræ Alianoræ reginæ Angliæ, in diversis debitis tenebatur die quo obiit, tibi præcipimus, quod omnes terras et tenementa quæ fuerunt prædicti episcopi in balliva tua, una cum omnibus bonis et catallis in eisdem aut alibi in balliva tua prædicta existentibus, sine dilatione capias in manum nostram, et ea sine aliqua distractione vel diminutione inde facienda, salvo custodiri facias. Ita quod nullus ad ea manum apponat, donec aliud inde tibi præceperimus." "Rex Vic. Suthf. salutem. Quia bonæ memoriæ W. nuper Rossensis episcopus jam defunctus nobis et karissimæ consorti nostræ Alianoræ reginæ Angliæ, in diversis debitis tenebatur die quo obiit, et executores testamenti sui sufficientem securitatem nobis jam fecerint de debitis illis, nobis et præfatæ reginæ fideliter solvendis ut tenentur; tibi mandamus, quod occasione alicujus mandati nostri tibi directi, de bonis et catallis dicti defuncti arrestandis occasione debitorum illorum nullatenus omittas, quin dictis executoribus de bonis et catallis quæ fuerunt dicti episcopi, ubicunque inventa fuerint, in balliva tua liberam administrationem sine quolibet impedimento habere facias [g]."

C A P. XXII.

NOS non tenebimus terras illorum qui convicti fuerint de feloniam, nisi per unum annum et unum diem; et tunc reddantur terre illo dominio feodorum.] The same law prevails in France with regard to the king's holding the lands of criminals, and for the same time. "Les fruits des immeubles de celuy qui est condamné par justice royale appartiennent au roy pour la

“ première année exempts de toutes dettes, autres que les
 “ rentes seigneuriales et foncières deues pour la dite année : et
 “ outre il a les meubles du condamné les dettes préalablement
 “ payées.” “ Ce droit est donné au roy à cause de sa souve-
 “ raine, et peut estre aussi en considération de la charge
 “ qu’il a de faire *faire* [b] les procès par ses officiers, et que par
 “ fois selon les occurrences l’on prend les frais sur la recette
 “ du domaine [c].” The addition of the *day* seems to have
 been made with an intention of preventing all disputes about
 inclusive and exclusive.

This term of a year and a day is likewise used in the Da-
 nish law. “ Si Agricola domum reliquerit, vicini per annum
 “ et diem, quo minus destruat, custodiant [d].”

C A P. XXIII.

O M N E S *kidelli* deponantur decetero penitus per *Tamisiam* et
Medeweyam et per totam *Angl.*, nisi per *castram maris*.] These
 Wears or Craves [e] (as the word *Kidellus* is sometimes trans-
 lated) both obstructing the navigation of rivers, and being the
 means of destroying the fish, are frequently prohibited both by
 the ancient English and Scotch Statutes. The navigation of ri-
 vers [m] hath been more early attended to [n] in all countries,
 than the other method of conveying commodities by land car-
 riage; and as most of the countries of Europe were at this time
 of the Roman Catholick persuasion, the preservation of fish
 was necessarily a greater object than it is at present. It appears
 by the old Chronicles, that there were *Kidelli* or Wears ancient-
 ly below London Bridge, as well as above it. These were not
 destroyed till 7 Hen. IV. when all the Wears, from Stanes to

[b] We say a writ runs.

[c] See *Coutumes Reformées de Normandie*, vol. i. p. 387.

[d] Jus Dan. p. 292.

[e] This word is derived from the French word *crue*. Boulaingvilliers mentions
 their great inconvenience in the *Rhine*; vol. i. p. 297.

[m] The old French law, collected in the *Institutes Coutumières*, lays down
 with precision the distinction between rivers. *Grands rivières ont pour le moins*
34 pieds de largeur, les petites 7, et les ruisseaux 3 ½. p. 55.

[n] Henry the First is said to have joined the rivers of Trent and Witham; and
 there is another regulation in *Magna Charta de Ripariis*. The first statute which
 relates to the highways is 23 Edw. I. ch. v.

the Medway, were removed [a]. The archbishop of Canterbury gave great opposition to this, who probably owned some of these Wears, and, from his influence had prevented this chapter of Magna Charta from being put in execution till that time.

The Wears, besides other inconveniences, prevented floats of wood from coming down the rivers, which must have been very sensibly felt formerly in this country, as coals were little used. This right of floating wood down a river makes a considerable head of German Law, under the name of *Jus gratiæ die flot-oder flot-gerechtighefts*. [p].

The pulling down Kidelli is one of the articles given in charge at the court of Eyre [q].

C A P. XXV.

UNA mensura vini sit per totum regnum nostrum, et una mensura cervisie, et una mensura bladi, scilicet et una latitudo pannorum. De ponderibus vero sit sicut de mensuris. It is remarkable, that, in the old Scotch laws, the measure of Caithness is referred to as a standard, which was probably, from its situation, the most uncivilised part of the country. [r].

It is a very early regulation in all the laws of Europe, that there should be a standard of one measure throughout the kingdom [s]. This is likewise very frequently enjoined by subsequent laws, and which appear never to be carried into execution. Montesquieu [t] says, *It is the mark of a little mind in a legislator to attempt regulations of this kind*; but he should rather have said, that it does not shew wisdom in a legislator to attempt what appears, by long experience, to be impracticable, though in theory it seems to be attended with

[a] Stow, p. 333.

[p] Krebs de Jure Ligni et Lapidum, p. 418. Coals were first used in London in the reign of Edward I. and the smoke was supposed to corrupt the air so much, that he forbade the use of them by proclamation. Stowe's London, vol. i. p. 2.

[q] Fleta, p. 25.

[r] See the Laws of David II. ch. xiv.

[s] Henry I. made this standard (for a yard) to be taken from his own arm; and one of the chronicles says, that he was *magni et proceri corporis*.

[t] Esprit des Loix.

no great difficulties, and much to be desired for general convenience. With us it hath been attempted by at least six different statutes, all which have proved ineffectual.

It appears, by Fabian's Chronicle, to have been now the custom to hang the scales in such a manner, that the buyer was to have an advantage of 10 or 12 pounds in a hundred: there was about this time, however, a regulation made by the corporation of London, that the scales should hang even, and that the buyer should be entitled to an allowance only of 4 lb. This regulation, reasonable as it was, they were obliged to defend before the king in council.

C A P. XXIX.

NULLUS liber homo capiatur vel imprisonetur aut disseisetur de libero tenemento suo, vel libertatibus, vel liberis consuetudinibus suis, aut utlagetur, aut exulet, aut aliquo modo destruatur: nec super eum ibimus, nec super eum mittemus, nisi per legale iudicium parium suorum, vel per legem terre. Nalli vendemus, nulli negabimus aut differemus rectum vel iustitiam.] Much hath been written upon the antiquity of the trial by jury in England, and whether the same form of trial hath been used in other countries. It is clear by the *Regiam Majestatem* [u] (which in most particulars is the same with our *Glanville*,) that this trial was used in Scotland, in civil matters, so early as David the first, who began his reign in 1124. "When the twelve royal men com-
" peer and pass upon the affize, they shall proceed and try
" qhuilk of the parties the persewer or the defendant hath
" best richt to the londs clamed [w]."

It appears from Olaus Wormius [x], that the trial by twelve men was first introduced into Denmark by Regnerus, surnamed Lodbrog, who began to reign in the year 820; and from whom Ethelred is said to have borrowed

[u] This book is considered as authentick by Sir Edward Coke, and most of the writers upon the Scotch law, except Craig, whose opinion Macdowal strongly combats. Since the former edition, I have been honoured with the communication of an ingenious treatise, which contains strong intrinsic proofs, that the *Regiam Majestatem* is copied from *Glanville*.

[w] This is cited from *Skene's translation of the Regiam Majestatem*.

[x] Mon. Dan. lib. i. ch. x. p. 72.

this institution. Pontoppidan, [y] says, "Defuit apud nos
 " duodecimvirale hoc judicium, remanentibus tamen ejus-
 " dem vestigia," and they are called in the Danish law *Sa-
 " de Mand. i. c. Viri veraces*. The material difference be-
 " tween these twelve judges, and an English jury, consists in
 " this; that the English jury is only impannelled for the de-
 " cision of a particular cause, whereas these twelve judges in
 " Denmark determine all causes, within the jurisdiction of
 " their court. It is not improbable, that our jury formerly de-
 " cided all causes within a certain district, without the assistance
 " of a judge, as questions were not then so intricate as they
 " are at present: and we are very much in the dark, about their
 " manner of proceeding, till the time of Edward the Second,
 " when the year books begin. It is much to be lamented, that
 " we have not a collection of the cases, which Chaucer says
 " his man of law carried in his head:

" In Termes had he case and domes al

" That fro the time of Kinge Williame was fall.

as, going further back, they must have necessarily thrown in-
 finite light upon questions of this sort.

There is a passage in Clarke's Preface to the Laws of Hoel
 Dda, which, at the same time that it shews this method of
 trial was in use amongst the Welsh, accounts in some measure
 for the unanimity required from the petit jury, and which is
 not required from the grand jury. His words are these: " Sa-
 " cramentum minus, vel (ut cum Wallis loquar) *Llw rheithbur*
 " *nod*, juramentum compurgatorum inferiorum, hoc erat;
 " cum homines non ingenui jurabant se credere juramentum
 " accusati esse verum: sacramentum alterum, *Llw rheithbur*
 " *arall*, cum homines ingenui jurabant, sibi verisimilius vi-
 " deri quod accusatus ante juraverat. In inferiori genere, si
 " unus solummodo compurgatorum juramentum detraxerit,
 " reliquorum testimonium nihil valuit; in altero, licet pars
 " tertia jurare noluerit, tamen secundum bessem judicatum
 " est: ad abnegandum idem delictum, eodem numero utriusque
 " generis compurgatorum saepius utebantur, quod unice pro-
 " bat, hanc majoris minorisque sacramenti distinctionem a
 " consacramentalium numero oriri non posse: et quod magis

"suadet errasse in hac re Hiccesium, apud Anglo-Normannos
 "a multis retro saeculis luculenta sunt hujusce moris paulu-
 "lum immutati vestigia. In judicium itinerantium curiis,
 "quas *grandes assizas* vocamus, ubi criminales provincialium
 "actiones expediuntur, de eodem delicto duo constituta sunt
 "ad veritatem inquirendam juratorum genera, qui sub mayo-
 "ris minorisve juratae nomine distinguuntur. His, nisi in
 "eandem omnes sententiam concefferint, veredictum sive res-
 "ponsum apud judicem proferre non licet; illis licet, si
 "vel duodecim consenserint. Ex hoc veteri compurgatorum
 "instituto emanasse demum duodecim viratus judicium, nec
 "ab eo (ut censuit Hiccesius) toto coelo differre, quae dicta
 "sunt, nullum dubitandi locum videntur reliquisse [x]." There
 is a record in the Appendix to the second volume of Dr Brady's Hist. which gives the whole form of the judgment, with the intervention of a jury, in the time of Charlemagne.

The unanimity of the twelve jurors in their verdict must be admitted to be a very singular institution. It should seem that the reason for requiring this unanimity at least in criminal prosecutions, arose from compassion to the prisoner who was to be tried; against whom, if the offence was not proved beyond all possibility of doubt in the most scrupulous juror, it was thought to be erring on the merciful side, that this single *juror* should acquit him. Another reason for this unanimity might possibly have arisen from attainments being frequently brought in ancient times against juries, to which punishment every juror was liable: as each individual, therefore, might be subject to the heavy punishment ensuing upon a conviction in such a prosecution, it might be reasonable that each should have a power of dissenting, and not be concluded by the opinion of others. The first of these reasons may account for the necessary unanimity in criminal causes, and the latter in those of a civil nature, in which cases only the prosecution of attainment took place.

In the time of Henry the third, it should seem (from a passage in Bracton) that this unanimity was not required from the first twelve who were impanelled. "Contingit etiam multoties quod juratores in veritate dicenda sibi

[x] P. xiv.

“ sint contrarii, ita quod in unam declinare non possunt
 “ sententiam, quo casu de consilio curiæ *afforcietur* assisa (i.
 “ e. *the number of jurors shall be increased*), ita quod appo-
 “ nantur alii, juxta numerum majoris partis quæ dissen-
 “ ferit, vel saltem quatuor, vel sex, et adjungantur aliis
 “ [a].” This continued likewise to be the practice in the
 next reign, when Fleta is supposed to have been written,
 “ Si autem juratores sibi invicem fuerint contrarii, quia in
 “ unam non poterunt ire sententiam, in *electione justiciariorum*
 “ erit *vel assisam afforciare* per alios, dum tamen sum-
 “ monitos juxta majorem partem dissentientium, vel eisdem
 “ juratores *compellere ad concordiam*, quod vicecomes videli-
 “ cet ipsos sine cibo et potu custodiri faciat, donec unani-
 “ mes fuerint vel concordēs [b].” This passage shews, that
 the judge had a power of insisting upon the unanimity of the
 first jury impannelled; and as it was probably found (when
 new jurors were added), that it was in reality the trouble
 of trying the cause over a second time, and so, *toties quoties*, at
 last for the greater dispatch of business, they insisted in all
 cases upon the unanimity of a jury. There are perhaps
 many Englishmen, and even lawyers, who do not know, that
 in Scotland the unanimity of a jury is not required (except
 in revenue causes before the court of Exchequer) and that
 the chancellor or foreman gives the verdict upon a majority of
 a single juror. They therefore consist of an odd number, viz.
 fifteen, and are chosen out of five and forty returned by the
 sheriff; the pannel or criminal having a right to challenge, as
 by the English law. We find that the jury’s consisting of
 an odd number is a very ancient regulation of the Scotch
 law. “ Such as be accused of any crime that deserves death,
 “ let them pass by the sentence of seven honest men, or else
 “ nine, eleven, or fifteen [c].” Fabian, in his Chronicle,
 gives a very particular account of the mayor and aldermen of
 London, claiming privileges in the reign of Henry the Third,

[a] Bract. lib. iv. ch. xix.

[b] Fleta, lib. iv. ch. ix.

[c] Law of Kenneth, mentioned by Boethius (Hollinshead’s translation). This law varies indeed from the statute of David the First before-cited; but is more ancient, and relates to the trial of a criminal, whereas the other relates to a civil action.

viz. that for a trespass against the king, a citizen should be tried by twelve of his citizens; for murder by thirty citizens; and for trespass against a stranger, by the oath of six citizens, and himself: is it possible to contend after this, that the trial by twelve jurymen was thoroughly established, or are there any passages, in the old historians, which clearly prove it to have been so established, before the time of Henry the Third?

The latter part of this chapter of Magna Charta is calculated to prevent abuses in the crown with regard to the administration of justice. It was usual to pay fines anciently for delaying law proceedings; this sometimes was extended to the defendant's life; sometimes fines were payed, to expedite process and to obtain right [d]. And in some cases, the parties litigant offered part of what they were to recover, to the crown. Madox [e], collects likewise many instances of fines for *the king's favour*, and there is a particular instance, of the dean of London paying twenty marks, as a fine to the king, that he might assist him against the bishop, in a law suit.

To the honour of the very pure administration of justice in this country (at least since the Revolution), we can hardly suppose such a practice to be avowed and established in a civilized country. But it must be remembered that Charles the Second, in appeals to the house of lords, used to go about whilst the cause was hearing, and solicit particular lords, for appellant and respondent [f]: and England is perhaps the only country in Europe, where the judges are not solicited; and in the face of the sun [g].

[d] The county of Norfolk (always represented as a litigious county, in so much that the number of attorneyes allowed to practise in it, is reduced by a statute of Henry the Sixth, to eight) payed an annual composition at the Exchequer, that they might be *fairly dealt with*. Madox's Hist. Excheq. p. 205.

[e] History of the Exchequer.

[f] Burnet's History.

[g] It likewise appears by many letters written by the Duke of Buckingham to Lord Bacon, that he solicited the Chancellor in particular causes. It must be owned however, that the recommendation is guarded, and such as might be expected from an able minister, and man of the world.

C A P. XXX.

OMNES mercatores, nisi publice antea prohibiti fuerint, habent saluum et securum conductum exire de Angl^a, et venire in Angl^a, et morari et ire per Angl^a, tam per terram quam per aquam, ad emend^{am} et vendend^{am} sine omnibus tollis malis, per antiquas et rectas consuetudines.] Montesquieu much commends the national humanity of this article of Magna Charta, the less to be expected from us as islanders, who, like the inhabitants of Ithaca in the time of Homer, are always represented as *hospitibus feri* :

Οὐ γὰρ ξένος οἶδε μὲν ἄνθρωπος ἀνιχόντας

Οὐδ' ἀπατόμενοι φίλους ὅς κ' ἀλλοθεν ἔλθοι.

Hom. Od.

By an ancient law of the Wisigoths, merchant strangers are not only to be well treated, but tried by their own laws [b].

By the Saxon law, “*Quinetiam si maris acta tempestatibus ad domicilium aliquod illustre, ac pacis beneficio donatum, navis appulerit inimica, nautæ ac res illorum omnes augusta pace potiuntur* [c].”

The plunder of shipwrecked goods is likewise made capital, in the year 1221, by a law of Sicily [d] : it is rather to our reproach, that the same offence hath not been made capital with us, till the first year of the late king.

There is a law in Lindenbrogue's collection (which does great honour to the ancient Bavarians) in protection of foreigners and strangers. “*Si autem aliquis tam præsumptuosus fuerit, ut peregrinis nocere voluerit, xiv. sol. mulctetur*” “*Deus nam dixit, Peregrinum et pauperem non contristabis de rebus suis.* [e].” On the contrary, the stranger had not the same protection from the Welsh laws. “*Tres sunt homines, quibus multa pro injuria eis illata non debetur; scilicet furiosus, alienigena, et leprosus* [f].”

It may be said, to the honour of humanity, in every part of the globe where any sort of civil policy or settled government is established, that the making prisoners those who are

[b] Fuero Jusgo, lib. ii. p. 436.

[c] Ll. Æthelr.

[d] Pragmaticæ Regni Siciliæ. Panormi, 1637.

[e] Lindenb. p. 412. *Ye shall not vex a stranger, nor oppress him; for ye were strangers in the land of Egypt.* Exod. xxii. 21.

[f] Leg. Hoel Dda, p. 330.

shipwrecked on their coasts is peculiar to Japan [n]. And this regulation (barbarous as it is) seems to have arisen from the total exclusion of Foreigners since the expulsion of the Portuguese, who attempted to alter the established religion of the country, as their ports before this were open.

C A P. XXXIV.

NULLUS capiatur aut imprisonetur propter appellum femine de morte alterius, quam viri sui.] Appeals are so much disused at present, that we may be apt to conceive, that no regulations with regard to them can be of any great constitutional importance; there were reasons however to prosecute offences in this manner, rather than by indictment, which do not hold at present. One of the methods, by which not only the kings of England, but of other parts of Europe, raised money at this time, was by pardoning crimes for considerable sums of money; which appears by the many ancient laws restraining this most excellent and humane prerogative as it is now exercised. The ancient punishment for murder was a *weregild* [s], payed as a satisfaction to the nearest relation; and it was therefore a most crying abuse of power in the king, not only to pardon this most heinous crime, but to grant this pardon for what otherwise should have been payed to the relation who prosecuted. It is in this sense (I should apprehend) that Lord Chief Justice Holt hath somewhere called an appeal, *a most noble birthright of an Englishman*, because it is a right which the crown cannot deprive him of. Bracton, an almost contemporary expositor of this statute, says, that the appeal given to a woman is confined to the death of her husband *inter brachia sua interfecti—si de visu loquatur*: the occasion of which restriction seems to be that, when a woman prosecuted, the appellee lost his right of defending himself by combat.

There are regulations with regard to appeals in many ancient laws of Europe. Thus by the Danish law, *jus accu-*

[n] See Kempf. in Append. p. 53, 71. 72.

[s] Uno enim infelici casu duos de medio tolli non ferebant. There are most minute regulations with regard to the appeal for murder, in *les assises de Jerusalem*.

sandi ex hoc delicto hæredibus proximis competit. [p]. So likewise by the ancient law of Scotland, "It is to wit, that in
" the plea anent murder, the wife may be admitted to accuse, because the man and his wife are but one flesh [q]."
In other cases, as by the Danish law, the nearest of blood is to appeal.

C A P. XXXVI.

NEC liceat de cetero alicui dare terram suam, &c.] Wachter [r] gives this account of this very singular expression of *Mortmain*, which is used in most of the ancient laws of Europe.
"Manus mortua per synecdochen est persona, cujus vires ad
" agendum vel præstandum defecerunt, idque vel naturaliter,
" vel civiliter. Et inde manus mortuæ dicuntur ecclesiæ,
" et collegia sacra, non alia certe de causa quam quod ea
" corpora (ratione immobilium bonorum, sive vetustissimi
" privilegii) exempta sunt a civilibus oneribus; et clerici
" habent manum mortuam ad omnia reipublicæ munera torpentem."

In the next century the giving of land to the clergy became subject of satire; for we find in *Piers Plowman's Vision*,

"The Friars followed folke that were rich,
" And folke that were poor at little price they set;
" And no Cors in the Kirke yard nor Kirke was buried,
" But quick he bequeath'd them ought or quit part of his debt."

[p] Leg. Dan. lib. vi. ch. vi. art. 3.

[q] Acts Jam. I. Upon this citation from a Scotch statute, it may not be improper to take notice of the different methods of passing a Scotch act of parliament, from those steps or ceremonies through which an English statute passes before it becomes an obligatory law. About twenty days before the holding of the parliament, proclamation was made to deliver in to the king's clerk, or register, all bills to be exhibited that session. *Then only such as I allow of are put into the chancellor's hands to be propounded to parliament; and after this, before I put my scepter to a law, I order what I please to be erased. Surely this amounts in me to a negative voice.* King James the First's Speech at Whitehall to the parliament. King James's Works, p. 523.

[r] Glossarium Germanicum, printed at Leipzig, 1738, in the article *TOTIENHAND*.

And

And Chaucer says of a Fryar,

" Full sweetly heard he confession,

" And pleasant was his absolution.

" He was an easy man to give pittance,

" There as he wist to have a good pittance."

Nor was this satire, on the rapaciousness of the clergy, confined to England (always represented as a country of libertinism); for the famous Jehan de Mehun, author of the *Romaunt of the Rose*, left to a monastery in France, a chest filled with nothing but vetches; and the friars, enraged at the ridicule and disappointment, would not suffer him to have Christian burial [5].

C A P. XXXVII.

[*IN cujus rei testimonium, &c.*] Such a number of witnesses being found inconvenient in attestation, Mabillon says, "*Lapso tempore, inventa est ab Anglicanis regibus compendiosior via, ut non aliis testibus, quam teste rege ipso uterentur; hujusce ritus originem Richardo Primo antiquiorem esse non puto, cujus complures literæ sub hac forma, reperiuntur [1].*" This might not be thought, however, an attestation of sufficient solemnity to the Great Charter, though Richard might have confirmed instruments of less consequence in that more compendious manner.

SOME laws of different countries of Europe have been mentioned in the preceding notes and comment upon *Magna Charta*. In order not to swell these observations unnecessarily, I have thought it more proper to reserve for the conclusion some laws of the French parliament, whilst it continued to have that freedom which Boulainvilliers hath so clearly proved it was anciently possessed of, at the same time that he pathetically laments his countrymen had not the same spirit in preserving their just rights, as our ancestors have so

[5] *Annales d'Acquytayne*, Paris, 1537. This Jehan de Mehun likewise translated Boethius *De consolatione Philosophiæ* into French; and it is probable that Chaucer, as he translated the *Romaunt of the Rose*, likewise translated Boethius from the French translation, which was very commonly practised at the revival of letters.

[1] *De re dipl.* p. 160.

nobly exerted: And I shall first give an ordinance of Louis the Eighth, in the year 1223, from which it will appear, that the French parliament at that time was constituted nearly in the same manner with that of England.

“ Louis 8^e. Sachez que par la volonte et consentement
“ des Archevêques, Evêques, Comtes, Barons, et Chevaliers du
“ Royaume de France, Nous avons fait etablissement sur les
“ Juifs, lequel ont jure d’ observer ceux dont les noms ensui-
“ vent.

“ Guillaume Eveque de Chalons.

“ Le Comte de Perche.

“ Philippe de Boulogne.

“ Robert de Courtenay Bouteiller de France.

“ Mathieu de Montmorency Connetable.

“ Remarquez que voici une constitution generale, etablie,
“ non par la volonte absolue du Roi, mais distinctement par
“ celle des Comtes, Barons, et Chevalerie du Royaume [u].”

In the following reign of Philippe le Bel, many of the different provinces of France (and amongst the rest of Normandy) obtained likewise charters and concessions from the king, which may be properly styled *Chartæ Libertatum*; and one of them indeed Boulainvilliers expressly calls the French Magna Charta. In the Norman charter (if I may so call it) there are two points insisted upon and allowed by the king, which exactly agree in substance, and indeed expression, with the twenty ninth chapter of Magna Charta, viz. that all nobles shall be tried *par leurs Pairs* (*per Pares*); and that all causes shall be determined *par la loy du Pays* (*per legem Terræ*). These laws, as they are made so very near the time of our Magna Charta, and by the same persons, viz. the powerful nobles and barons in both kingdoms, seem to be expository of each other; and I should therefore conceive, that the trial *per Pares*, in the twenty ninth chapter of Magna Charta, was meant chiefly to relate to the trial of the Barons by their Peers, though it hath, fortunately for the liberties of this country, been expounded to extend to the trial of all persons by a jury. It seems very extraordinary, that we have not, after this 29th

[u] Boulainvilliers, Etat de la France, vol. iii. p. 56.

article of Magna Charta, more frequent accounts in the early part of the English history of Peers being tried either by their peers, or a jury. The earl of Gloucester was executed, in the time of Edward the Second, without any such regular trial [w]. As were also the Lords Hastings and Ryvers, in the reign of Richard the Third [x].

It must be said (to the honour of the French barons), that there are some most material provisions, in favour of liberty and the rights of the subject, which are not to be found in Magna Charta. They particularly abolished torture (though the practice may have since prevailed in France [y]); and likewise expressly stipulated, that no money should be raised for the king without the express consent *des trois États*: of which most essential right we have no fully declaratory statute till the 25 Ed. I. ch. v. [z].

[w] Brady, vol. iii. p. 166.

[x] Collier's Eccl. Hist. vol. i. p. 687. Notwithstanding this 29th article of Magna Charta was chiefly intended to prevent the undue influence of the crown in the trial of a peer, it turned out afterwards to be the great cause of their oppression, as before the statute of William the Third, which directs *all the Lords* to be summoned, a peer of England was the only subject of this country who had not a fair and indifferent trial. It seems to be a very extraordinary construction of this statute, which is rather insinuated, than contended for by Mr. Justice Foster, in his treatise on Treason, that the Spiritual Lords need not be summoned under the words *all who have a right to sit, and vote in Parliament*, which I apprehend to have meant only the making it unnecessary to summon Peers who were minors, or professed papists. As for the Bishops usually requesting to retire before the condemnation, or acquittal, I have endeavoured, in the comment on the 27 Edw. I. to account for the reason of that *Canon's* being established at the Council of Toledo.

[y] It will be proved in some observations on the 3 Edw. I. ch. xii. that torture was formerly used in England.

[z] The article of Magna Charta, which relates to Escheage, was not sufficiently express with regard to this great constitutional point; otherwise the statute of the 25 Edw. I. would not have been necessary, and which, in many respects, likewise goes further, and is infinitely more explicit. That no money could be raised anciently in France without the consent of the Three States is most clearly proved by the testimony of Fortescue. "And how so be it, that the French Kinges reynithe upon his people *dominio Regali*, yet *Sainte Lewes* sometime Kinge of France, he alyve of his progenitours, *se never talye, or other imposition without the assent of the assentis, which when they be assembled, ar like to the Court of Parliament in England*. And this order kept many of his successours, until late days, that Englishmen made such a war in France, that the *three assentis* durst not comie together. And then from necessity the Kyng took upon him to set talye upon the *Commons without the assent of the three assentis*, but yet he would not set any such charge upon the nobles, for fear of rebellion." Fortesc. on Lim. Mon. p. 15. It may not be improper here to observe, that no proof can be more irrefragable than the citation from this author, as he was a considerable time in France whilst he attended upon the prince of Wales, son of Henry the Sixth, and at that very period when the requiring of the assent of the three constituent parts of the French legislature was first disused.

CHARTA FORESTÆ.

THE Charter of Forests, in all editions of the Statutes, immediately follows the Great Charter [a], though by the preamble it appears to be an Ordinance or Statute of Edward the First, reciting the Charter of Henry the Third, his father, by *Inspeximus*, and re-enacting and confirming it. From the great alteration between the circumstances of the present times, and those when this law first took place, it does not seem to contain any point of great constitutional importance, though, by being joined to Magna Charta, they are generally styled (taken together) *Chartæ Libertatum*.

A king of England could not formerly amuse himself in his library, or by promoting and encouraging the more elegant arts,* and from the dignity of his station he could not fill up his time by intermixing with common society. It was therefore necessary for him to move from one place to another, and at each of his palaces to have a great extent of Forest surrounding it for the purpose of hunting, whilst at the same time a large tract of uncultivated desert was supposed to contribute to magnificence. This extent of Forest, always imagined by a hunter (even if not a king) to be too contracted—

Ut brevibus clausus Gyaris, parvaque Seripho,
naturally produced oppression on those whose property unfortunately bordered on such a Forest [b]; and Sir Robert Cotton [c] mentions, that Robert de Parnslow, in the reign of Henry the Third, had procured large sums of money, under pretence of encroachments and assarts [d].

[a] Magna Charta is indeed likewise printed in the different editions of the Statutes, from the Statute of confirmation by Edward the First, reciting an *Inspeximus*.

[b] The great attention of the kings of France about this time to the preservation of the deer in their Forests, appears by a record of a grant mentioned by Mabilion, in his treatise *De re diplomatica*, p. 611. "Concessimus Oatlando abbati et monachis ex monasterio Sithin, quod libere possint venari unde fratres consolationem habeant, tam ad volumina librorum contegenda, quam ad manicas et zonas faciendas, salvois tamen forestis nostris."

[c] In his *Posthuma*.

[d] *Assarts* are places where the wood hath been grubbed up, "ils coupent et effertent du bois," Lery's *Voyage to Brazil*.

The first article therefore of this charter of the Forests reducing them by the view of a jury of ambulators to their limits, in the time of Henry the Second, was certainly a point of no inconsiderable importance: especially when we find, by the tenth chapter of this charter, that the killing of the king's deer was before that punished with the loss of life or limb, at the same time that a murderer only payed his we-regild, or was entitled to his benefit of clergy.

CAP. IX.

UNUSQUISQUE liber homo agistet boscum suum in Foresta pro voluntate sua, et habeat pannagium suum. Concedimus etiam quod unusquisque liber homo possit ducere porcos suos per dominicum boscum nostrum libere, et sine impedimento ad agistandum eos in boscis suis propriis—et si porci alicujus liberi hominis una nocte pernoctaverint in Foresta nostra, non aliquid de suo perdat.] It appears from this, that pannage (or pawnage, as it is improperly spelt in the translation of the Statutes) was considered as being of great profit to those who lived in the neighbourhood of the Forests, for the feeding of swine, though at present it is little attended to. The people of this country, in the winter, chiefly subsisted upon salted meat, even in the castles of the great men and barons; and we therefore find in Domesday, that it is always stated for how many hogs the estate hath mast or pannage: and the author of the ancient Law Book, called Fleta, hath a whole chapter *de custodia porcorum*. This animal, notwithstanding its great use, is now considered as so contemptible, that the ridicule, in some measure, is extended to those who have the care of them; and yet in the time of Homer, Eumæus is styled the $\Delta\iota\omicron\varsigma \ \omega\phi\omicron\epsilon\lambda\omicron\varsigma$, and is one of the most considerable persons in the island of Ithaca. Plutarch, in his Symposiacs, likewise introduces philosophers disputing, whether the Jews abstaining from the flesh of swine, may not arise from the adoring or worshipping this animal.

CAP. X.

QUICUNQUE *Archiepiscopus, Episcopus, Comes, vel Baro, veniens ad nos ad mandatum nostrum transierit per Forestam nostram, liceat ei capere unam bestiam vel duas per visum Forestarii, si presens fuerit; sin autem, faciat cornari, ne videatur furtive hoc facere. Idem liceat eis in redeundo.*] This privilege of killing a deer or two is confined to an Archbishop, Bishop [e], Earl, or Baron which possibly many of those who are still entitled to it under this statute may be not acquainted with. The privilege indeed is not granted in the most polite manner, by injoining the necessity to such respectable personages coming to the king, *per mandatum nostrum*, [f], to give notice by blowing a horn, *ne videatur furtive hoc facere*. It may likewise be inferred, from this privilege being confined to barons and superior degrees of nobility, that the members of the lower house (if there was at this time any members of what is now called the *House of Commons*) were not considered as of much importance. When the crown at present gives any small favours (as places for public fireworks, or medals upon a coronation) the members of the house of commons are not forgotten.

CAP. XII & XIII.

UNUSQUISQUE *liber homo de catero sine occasione [g] faciat in bosco suo, vel, in terra sua, marlexam. et habeat in boscis suis aerias accipitrum, asparuariorum, falconum, aquilarum, et heironum, similiter mel quod invenientur fuerit in boscis suis.*

This

[e] Prynne, in his Collection of Records, hath often occasion to observe upon the great esteem that venison was held in by the bishops and abbots of those times. The archbishop of Canterbury, who loved venison more than his sovereigns or people's souls, claimed thirteen bucks, vol. iii. p. 267. and afterwards, how well the bishops loved venison and hunting in those days, will appear by another record, &c.

[f] In 4th Inst. p. 308. these words *per mandatum nostrum* are expounded to extend to a nobleman's coming to parliament.

[g] The word *occasione* is translated in all the editions of our Statutes, and even in Mr. Ruffhead's, who hath rectified some mistakes of this kind by the word *danger*. Du Fresnoy, however, makes the signification of it to be a fine or tribute, and cites Rodericus Tolit. in Hist. Arabum, *Fiscum diversis occasionibus augmentavit*;

This statute passed in the year 1225, and the privilege of sinking a marl pit, is a proof of an early attention and knowledge in the improvement of land. We find that, in the *Statutum Wallie* (12 Edw. I.) it is one of the instructions to the sheriff, and coroner, to inquire *de fossatis et marleria levatis juxta iter publicum*; which shews, that this kind of manure was very commonly used. When a marl pit was sunk in ground that did not belong to the king, but which happened to be in the purlieu, or neighbourhood of a forest; prosecutions were instituted in the Forest courts, which imposed heavy fines for the offence, as the pit occasioned both inconvenience and danger to the hunter.

From the provision with regard to falcons, &c. it should seem the king claimed them wherever found as royal birds. It is well known, that falconry, together with hunting, was the principal amusement of the great barons, and consequently that hawks were very valuable. It was indeed so expensive, and required so many attendants, that few could afford such an establishment; but those who did not themselves keep falcons, or falconers, were frequently obliged, by the grants of their lands, to procure them annually for those under whom they held their estates. Littleton, in his treatise upon Tenants in Common, puts the instance of two tenants in common granting a lease of land upon condition of the tenant's paying every year a falcon, and he determines very seriously, that they shall have but one assise for it, *car homme ne doit faire un plaint en assise de le moitie d'un espervier*. Now cases are generally put by lawyers, which most commonly happen in the times they live in, and it need not be said, that such a case could not at present be mentioned without ridicule.

The express privilege insisted upon with regard to every man's being entitled to the honey which he finds on his own ground, may in more modern times appear singular, when perhaps there hath been no law-suit, or question about honey,

acquit; and likewise from the same author, *remota omni occasione regali et papali*. It should therefore perhaps be more properly translated, every man may sink a Marl pit in his own ground, without being fined. I take the verb *occasioner*, formed from this substantive, to be used in the same sense in the 9th chapter of this law, "*non inde occasionetur, unde aliquid de suo perdat*;" and du Fresnoie likewise says, that the signification of that word is, *prestationibus gravare*.

for

for the last three hundred years ; before the plantations of sugar however in the West-Indies, it must necessarily have been in much greater request and born a much higher price. The wax likewise must have been of considerable value, as the manufacture of tallow candles is not very antient. There is a statute of Henry the Sixth with regard to wax chandlers, the preamble to which sets forth that wax was used in great quantities, not only for the purpose of making candles, but likewise images of saints ; and it appears by the laws of Hoel Dda, that the wax of bees was applied chiefly to this use. Besides this, mead [b] was now the liquor of luxury, and still continues in great request in Wales and the northren parts of Europe, where bees make a principal head both of the Danish and Swedish [i] laws even to this day. It is likewise a considerable head of the ancient French law, under the title *Aboilage*.

C A P. XVI.

PLACITA de Foresta, sive de viridi. Presententur capitali Forestario nostro cum in illas parteis venerit ad tenendum placita de Foresta.] Those who may have a curiosity to see the method of proceeding before the justice in Eyre, may consult Dr. Brady's Appendix to his History ; and likewise a record now first printed in Mr. Blackstone's Introduction to the *Charters*. The last instance of the justice in Eyres having held a court in any of the Forests, is believed to have been in the reign of Charles the Second. This is mentioned by Mr. Roger North, in his Life of the Lord Keeper, and he himself attended as king's council : it hath since been dropt (though not perhaps without its use) from the great expence to the crown.

[b] Plutarch, in his *Symposiacs*, observes, that all nations who have not wine, use instead of it *μέλιτρον*, which must be supposed to be a kind of mead.

[i] "Qui alvearium domesticum apium infra septa alterius furaverit, capite puniatur." *Themis Romano-Suecica*, Gryphiswaldiz, p. 53.

STATUTUM HIBERNIÆ de COHEREDIBUS.

14 Hen. III. A. D. 1229.

THIS *Statutum Hiberniæ* follows the two Great Charters in all editions of the statutes. Mr. Cay very properly observes, that, it is not an act of parliament, and cites the old abridgement, Title *Homage*. He allows it a place however in his edition of the Statutes, not to differ from former editors [k]. This, in some measure, gives the authority of legislation to the king's law printers; and yet, if such an ordinance is inserted in every edition of the Statutes, for near three centuries together, by printers known to print under the authority of the king's patent, and the parliament permits this for such a length of time, it becomes a question of some difficulty to say what force it may have acquired [l]. No such question fortunately can ever arise upon this statute, as it is merely a *rescriptum principis* to certain *milites* (adventurers probably in the conquest of Ireland, or their descendants), who had doubts *how lands holden by knight service descending to coparceners within age should be divided* [m]. The king informs the justiciary of Ireland what is the law and custom in England with regard to this; and I cannot say, that he does it in the most precise and intelligible manner. There is a passage however at the latter end of the answer, which is too singular to be omitted, "et si primogenita sit heres omnium aliarum sororum suarum, vel puerorum suorum; si obierint sine hærede de seipsis, posset habere custodiam suarum sororum; sed hoc esset quasi committere lupum agno devorandum." There is the same jealousy in the laws of many other countries, that

[A] There is not perhaps in the great collection of Rymer any act which may not as much be considered as a statute, as this *Statutum Hiberniæ*.

[l] This is a very strong reason, amongst others, given in the Appendix for a proper revision of our statute code.

[m] Littleton, in his chapter of *Parceners*, takes no notice of the doubt in this statute, which he must necessarily have done, if this ordinance was considered as a law in the time of Edward the Fourth. As he lived however before the invention of printing, possibly the greatest lawyers had only a collection of those statutes which were most frequently in use.

the person who is to get any thing by the death of the orphan shall not have the nurture of him. Thus by a law of Solon, mentioned by Diogenes Laertius, μηδ' ἐπιτροπὴν εἰς ὃν ἡ υἱία ἐρχέται, τῶν ὀρφανῶν τελευτήσαντων; and Puffendorf takes notice, that, amongst the Jews, the son for the same reason was not permitted to extract a thorn from his father's foot.

All the editions of the Statutes have marked this ordinance as *obsolete*, which introduces another question of great importance, whether any statute can be obsolete, or any way lose its force but by actual repeal; *eodem ligamine quo ligatur*. No English lawyer hath ever advanced such a doctrine, though by the law of Scotland a statute is said to lose its force by *desuetude* [n], if it hath not been put in execution for sixty years [o]; and a distinction is made between statutes which are as it were *half obsolete*, and those *in viridi observantia*.

[n] Stair, Macdougal, Wallace.

[o] Some Scots lawyers have extended this to a century. It appears by the 13 Edw. I. ch. vi. entitled, *Forma exemplificationis Chartarum*, that it was supposed at that time that some of the articles of Magna Charta might be obsolete; and the Treasurer and Barons of the Exchequer, together with the Judges of both Benches, are ordered to inquire *de usu articuli, vel articulorum, et si plane fuerit usitatus*.

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STATUTUM DE MERTON.

20 Hen. III. A. D. 1236.

THIS statute [o], as well as many others in this century, seems to be only an ordinance; the difference between an ordinance and statute (according to Sir Edward Coke) consisting in this, that the ordinance wants the consent of one component part of the legislature, which is, in all instances, *that of the Commons* [p]. It hath however been long printed, and considered as an act of parliament, and improvements of waste grounds by inclosing are not unfrequently made under the fourth chapter of it. It is called the Statute of Merton, from the parliament, or rather council, sitting at the Priory of Merton, in Surry, which belonged to Canones Regulares, according to Dugdale. Though some of the priories might have had very large and spacious houses, yet it is not probable that there could have been accommodation [q] for what is now called a Parliament, with the intervention of Commons, and it should seem, from Dugdale's short account of this Priory, that it was by no means largely endowed.

This statute, in its different chapters, contains many wise regulations. The kingdom was at peace, and the king had the spirit to refuse his assent to a very tyrannical request of the barons, that, if any offence was committed in their parks or

[o] This statute is inserted in the *Annal. Monast. Burton*, Gale, vol. i. p. 287.

[p] Elfringe states the distinction thus: "What begun in the Commons was only termed a petition (for they had no power to ordain); and what begun in the Lords was styled an ordinance. *Actus Parliamenti* was an act made by the Lords and Commons; and it became *Statutum* when it received the King's consent." Elfringe. p. 26.

[q] In all the ancient palaces of the kings of England, there was a large room, or hall, for the accommodation of what was then called a Parliament, and which went by the name of the Parliament Chamber. There is such a hall (now converted into a barn) at Eltham, in Kent, which is said to have been a palace of King John; and I have little doubt but that Westminster-Hall was built for the same purpose. There is likewise such a room in the old palaces of the king's of Scotland, and particularly at Linlithgow and Sterling.

ponds [r] the offender was to be sent to their own prisons, and tried, undoubtedly, in their own courts: and when in the year 1329, a statute was made, entitled, *De Malefactoribus in Parcibus*, this oppressive clause is omitted: though in other respects the punishment of such offenders is very severe. One of the old Chronicles says, that the barons, after they had carried their points by the provisions in Magna Charta, "eva-
"serunt totidem tyranni;" and as the commons could not at this time resist their oppression, the only altar of refuge was in the crown.

CAP. IV.

ITEM quia multi magnates Anglie, qui feoffaverunt milites et alios libere tenentes suos de parvis tenementis in magnis maneriis suis, questi fuerunt, quod commodum suum facere non poterunt de residuo maneriorum suorum, sicut de vastis, boscis, et pasturis (communibus), cum ipsi feoffati habeant sufficientem pasturam, quantum pertinet ad tenementa sua &c.] There is a reading of Fitzherbert (who was judge of the Common Pleas in the reign of Henry the Eighth) upon the statute of 4 Edw. I. entitled, *Extenta Manerii*. In this reading, he hath occasion to explain what shall be deemed sufficient common of pasture, and gives his explanation in these words: "It is necessary to knowen what is sufficient common of pasture, and that me seemeth by reason should be thus, To se how muche cattel the hay and the strawe that a husbandman getteth upon his own tenements, will find sufficiently in winter, if they lye in the house, and be kept therewith all the winter season; for so much cattel should he have common in sommer, and that is sufficient." As improve-

[r] The word in the original is *vivarium*, which I have translated a pond, agreeable to the common translation of the statutes. It is very true, that the classical signification of the word is often pond or stew.

Plures annabunt thynni et vivaria crescent.

fugitivum dicere piscem.

Depastumque diu vivaria Caesaris. Juvenal.

But the Latin of the Glossaries must fix the signification of a word in an antient statute. Spelman says, "*parci et warrenæ nostræ, sub vivariorum appellatione sæpe veniunt*" And to confirm this sense of the word, *carp*, which is the most valuable pond-fish, was not known in England at this time. It should therefore be translated *warrens* and not *pond*; *warren*, from the old French word *garrenne*, signifying a tract of ground in which the lord had a right *garrenner*, or to forbid others killing the game.

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ments are sometimes, even now, made under this statute (though the facility of procuring private acts of parliament for the same purpose makes it every day less frequent), and the great question on these occasions is, *whether sufficient common is left*; I thought it might not be improper to give the construction of this great lawyer and father of English husbandry upon these words of the statute. This reading of Fitzherbert's is entitled *Surveyenge*, and is printed by Berthelet in 1539.

C A P. V.

SIMILITER *provisum est, et a domino rege concessum, quod de cetero non current usure contra aliquem infra ætatem existentem,*] the effects and debts of an usurer were antiently forfeited to the king, as appears by many records in Prynne's Collection; Tacitus says, that, amongst the Germans, "*scænus agitare ignotum, ideoque magis servatur, quam si vetitum esset*" The true reason probably for its not prevailing amongst them, or our ancestors, was, that they had little or no personal property, and those who have landed estates have always been envious of the sudden fortunes raised by commerce, and the improvement and increase of personal estates. Treatise may be written on treatise to prove that these two interests mutually support and strengthen each other; the prejudice may indeed be somewhat lessened, but cannot be eradicated.

C A P. IX.

ET *rogaverunt omnes episcopi magnates, ut consentirent, quod nati ante matrimonium essent legitimi, sicut illi qui nati sunt post matrimonium, quantum ad successionem hereditariam, quia ecclesia tales habet pro legitimis. Et omnes comites et barones una voce responderunt quod nolunt leges Angliæ mutare, quæ hucusque usitate sunt et approbatæ.*] Selden [s] says, that Robert Grosseteste, bishop of London wrote about this time a treatise to

[s] Dissertatio ad Fletam.

prove the necessity of introducing the civil law into this country [t]; and Sir Edward Coke [u], mentions, that William de la Pole, duke of Suffolk, attempted the same innovation in the reign of Henry the Sixth; which occasioned Fortescue's writing his treatise *De laudibus legum Angliæ* [w]. It was one of the articles of impeachment against Cardinal Wolsey, "quod ipse intendebat finaliter antiquissimas Anglicanas leges penitus subvertere, et hoc regnum Angliæ, et ejusdem regni populum dictis legibus civilibus, et cononibus subjungere."

Notwithstanding the opposition to the introducing this part of the Civil law to legitimate the children of those who married after living in a state of fornication (which seems to be a very humane law in favour of the innocent) it by no means prevails to the full extent, in those countries which are supposed to have adopted the civil law. For example, by the ancient laws of Spain the legitimization of the children, by a subsequent marriage, is confined to the case of a bachelor marrying a spinster, *Si ome soltero con muger soltera fiziere fijos, e despue casare non ella, estos fijos sean herederos* [x].

The remarkable opposition to the introducing this part of the civil law, probably arose from its being proposed by one of the Poictevine favourites of Henry the Third. The sturdy barons, not approving of the proposer, rejected the proposal *una voce*. *You are a foreigner, and shall not introduce foreign laws, be they good or bad.*

[t] Selden likewise mentions in the same dissertation, that, notwithstanding this unanimous dissent of the barons, in another reign the children of John of Gaunt, by his wife Catherine before marriage, were made legitimate by act of parliament.

[u] 3d Inst. p. 208.

[w] The author, who speaks the most disrespectfully of the common law of England, is a French writer, "Leges Angliæ plenz sunt tricarum, ambiguitatumque, et sibi contrariæ. Fuserunt siquidem excogitate atque sancite a Normannis, quibus nulla gens magis litigiosa, atque in controversiis machinandis, et proferendis fallacior reperiri potest." Philip. Honor.

[x] *Fuer. Real de Espan.* p. 134. printed at Salamanca, 1569.

ASSISA PANISET CEREVISIÆ[y].

51 Hen. III. A. D. 1266.

THE parliament or council upon this occasion was held at Winchester *quo vocati sunt omnes magnates terra*; and, what is more extraordinary, "*omnes uxores comitum, et baronum qui in bello occisi fuerunt, vel captivorum [z].*" I shall consider this as being part of another statute made the same year (which is entitled, *Judicium Pillorie*, being the punishment of a baker, who shall offend against these regulations) notwithstanding four other acts of parliament (and relative to very different matters) intervene.

The author of Fleta hath made these regulations part of his work, without taking notice that they arise from any authority of the legislature; and, with regard to the measures of those times, those who have curiosity on this head, may consult him from p. 74 to 76; as likewise similar regulations in France, by King John, contemporary with Edward the Third [a].

The present statute recites the king's *Inspeximus* of certain ordinances of *Affise*, made in the time of his progenitors kings of England; and indeed those who supply the people with their necessary food and drink (as bakers, brewers, and millers) have not only always been suspected [b] more than other traders of impositions, but have likewise been subject to regulations of particular severity. It might perhaps be going too far to assert that all regulations of this sort are rather prejudicial to the public, than beneficial; it may however be said,

[y] This *Affisa Panis et Cerevisiæ* is to be found in Matthew Paris, with some additions.

[z] *Annal. Waverl. Gale*, vol. iii. p. 220.

[a] *Ord. Royal.* p. 5. & seq.

[b] Thus Chaucer says of a miller,

"Well couthe he steale corne and told it thriſe."

And in another place,

"For whiche this miller stole both whete and corne,

"And hundred times more than beforne."

that much judgment and caution should be used by the magistrate who carries them into execution.

I shall not enter into the *minutiae* of the regulations contained in the present law, especially as it is repealed by the statute of Queen Ann. There are however some particularities in it which deserve notice.

The offender against this law, for the first and second offence (if a baker) is to be amerced, and for the third *patiat* *judicium corporis* (sc. *collistrigium*) if a brewer (*braciatrix*) the punishment is *trebuchetum* sive *castigatio*. It seems difficult to assign any reason why the baker and brewer should, for very similar offences, be punished in a different manner by the same law, if the word *braciatrix* is not attended to, which signifies a *woman* brewer, though it is translated as if it was *brasiator*, which is the only word to be found in Du Frense. Women therefore at this time probably carried on this trade; and we find by the citation from Gale, that many women attended this parliament [c]. The punishment of the *braciatrix* is the *trebuchetum* [d], translated the *tumbrel*, which is the same with the ducking or cucking stool; and a punishment used anciently for women offenders in this country. The baker is to be punished by the *collistrigium*, and not, as it is improperly translated, by the *pillory*; for Sir Henry Spelman [e], very

[c] By 37 Edw. III. ch. vi. *bracerescens* and *pefferesces* are mentioned, and classed with other trades carried on by women.

[d] The most common signification of *trebuchetum* is a machine, antiently used in the siege of towns. The etymology of the word, in the sense we use it, seems to arise from the Celtic, *tre*, which Bullet renders *vill*; and our common word *bucket*, which is likewise probably Celtic (though there is an old French word of *Baquet*), it will then signify the *town* or *village-bucket*.

[e] "*Pilloria, rix.*" Et *Coruello* Pillorium, alias *Collistrigium*. A Gall. *Pil.* "Est supplicii machina ad ludibrium, magis quam poenam, quo quis super pegmate constitutus, comprehensoque inter fauces duarum tabularum ideo cavatarum collo, spectaculum populo præbatur deridendum. Originem vocis *Coruello* expetit a Græc. *πύλα* pro *janua*, et *ὀπδω*, i. e. *video*, quod delinquens ac si per januam emissio capite prospiceret: quod ipse certe non probo, nec habeo tamen quod proferam. Sua Gallis relinquo erimanda, hujus enim ipsi nobis sunt authores. Et forte a notiori fonte deducunt: utpote e vernaculo suo *pilleur*, quod depeculatorem significat; cuiusmodi esse noscuntur ipsi quibus hoc supplicii primo institutum fuit, scil. pistorum, qui suis in pane fallaciis rempib. depeculantur; a quo et ipsa sua nequitia *pilleurie* dicta fuit, quasi depeculatio: ex sic vox proprie ad delicti naturam spectat, non ad supplicii instrumentum, quod suo vocabulo *collistrigium* nuncupant: licet ad hoc etiam postea deferatur. Suadere id mihi quidem videntur ipsa verba Statuti de Pistoribus, ubi dicitur, *subeat judicium pilloria*, ac si legeretur *subeat judicium depeculationis*," Glossary.

judiciously observes, that *pillory* [*f*] was formerly used to signify the offence, and not the mode of punishment.

Both the *trebuchetum* and the *collistrigium* were intended *magis ad ludibrium, et infamiam, quam ad pœnam*, say the Glossaries. It may therefore well deserve the consideration of a judge, who inflicts the punishment of the pillory (as it becomes at present the great occasion of mobs and riots) whether it can be reconciled to the original intention of the law in this mode of punishment; and particularly, if this riotous scene ends in the death [*g*] of the criminal, whether the judge is not in some measure accessory both to the riot and the murder.

[*f*] *Pilleuris* is frequently used in the old French chronicles in this sense.

[*g*] There hath been more than one instance of such a murder within these twenty years. The chief intention of setting an offender in the pillory is, that that he should become infamous, and known for such afterwards by the spectators. Can an offender, whose face is covered with rotten eggs and dirt, be known again, so as to prevent his gaining a new credit with those who have occasion afterwards to deal with him?

STATU-

STATUTUM DE SCACCARIO [b].

51 Hen. III. A. D. 1266.

I SHALL consider this and the preceding statute entitled, *Statutum de distinctione Scaccarii*, as different chapters of the same law, though they are in all editions printed as distinct statutes. There being at this time no commissioners of customs, or excise, the whole revenue of the crown was not only received, but accounted for before the officers of the Exchequer. As for the Lord Treasurer, I have a very fair and compleat Court Kalendar (if I may so call it) for the year 1553, and first of Queen Mary, in which the *Lord Treasurer* is placed at the head of the officers of the Receipt of the Exchequer, without any one subordinate officer to him, as Lord Treasurer. Whatever his powers might have been, they were exercised in concurrence with the officers of the Exchequer, and perhaps he was himself only the chief and supreme officer without any distinct board or department as at present [i]. Every subject therefore had more or less to do with these revenue officers, who were armed with the terrors of the crown process: and it was naturally to be expected, that there should be great abuses and oppressions, which could only be prevented by the interposition of the legislature. What these oppressions were appears by the provisions of the statute. The sheriffs at this time generally farmed the king's revenue, and consequently were guilty of those enormities and exactions which the farmers of the public revenue have in all countries been justly charged with. One means of oppression was by distraining the farmers cattle used for ploughing (which the statute emphatically says, *gaignent la terre*); and not content with this, he was not permitted to feed his cattle whilst impounded. The poor beasts were either starved, or,

[b] The statute of Roteland is styled *Statutum novum de Scaccario*.

[i] It is almost unnecessary to refer the reader to Madox's learned Collections on this and other matters of antiquity relative to the Exchequer.

if fed by the king's bailiff, the owner was charged at an immoderate price for their sustenance [k]. The debt was frequently very trifling; and yet the distraining a whole team of oxen, prevented the farmer from cultivating his land; the statute therefore directs, "que les destresces soient raisonnées a la mountance de la dette (the value to be settled), " par l'estimation des vefins". Even after the debt was payed, the oppression did not end; for the officers of the crown harassed the accountants by pretending that the whole demand was not satisfied; the statute therefore most humanely declares, that, if any receipt could be produced, it should be taken to be a receipt in full.

The first part of the statute having provided against the extortions of the officers of the crown, proceeds to make regulations, which may prevent imposition in the collecting of duties, or unreasonable and dishonest charges and demands made upon the king. The principal revenue of the crown upon exports was, at this time, the customs upon wool, which was then sent chiefly to Flanders, and there manufactured. Accounts could not be settled in the compendious and accurate manner which prevails at present, and the crown was defrauded in the duties upon wool exported, by the articles not being sufficiently particularized. The statute therefore directs, that it shall be stated how much wool was exported in each particular ship, and how much was shipped on board at the different ports the ship might touch at [l].

The next material regulation is to prevent the king's being overcharged by his artificans and workmen, which seems in *more modern times* to deserve much to be enforced [m]. The method taken is, "que les veours des ovreigner le roy soient élus per serment des prodes hommes" (able men); and if the king or barons of the Exchequer have any suspicion of imposition, the reasonable price is to be settled by such viewers or surveyors.

[k] The statute therefore allows him to feed his own cattle whilst impounded. It hath been before observed in the Comment of Magna Charta, that land was frequently held by the tenure of feeding the cattle which were distrained for the king's debts.

[l] It should seem from this regulation, that there were no officers at any port but that of London, or perhaps two or three other principal ports.

[m] The statute continues unrepealed.

As this is the first statute in the French language, it may not be improper to consider whence it might arise, that the antient statutes, from the present to 1 Rich. III. A. D. 1483, should be generally in the French language; and even after the statute of Edward the Third had abolished it in pleadings [n]. The antient laws of some other countries in Europe are indeed in the Latin language, in which there was a peculiar convenience from the frequent appeals to the pope; but there is no other instance of any country in Europe permitting their laws to be enacted in a *modern European* [o] language, and that not their own. The antient laws of Scotland are in Latin; the laws of the Saxons in the Saxon tongue; and the antient statutes of Ireland, which begin with the statute of Kilkenny, in the reign of Edward the Second, are in English [p]. The laws of Sweden and Denmark were originally in their own languages [q]; but have, within the last century, been translated into Latin. The laws of Spain are in Spanish, and that infinitely more pure than could be expected from their antiqui-

[n] Fortescue, in his 48th Chapter, *De laudibus legum Angliæ*, gives the following account of this: "In universitatibus Angliæ, non docentur scientiæ nisi in Latina lingua: et leges terræ illius in triplici lingua addiscuntur: videlicet, Anglica, Gallica, et Latina. Anglica, quia inter Anglos lex illa maxime inolevit. Gallica, quia postquam Galli, Duce Withelmo Angliæ Conquestore, terram illam obtinuerunt, non permiserunt ipsi eorum advocatos placitare causas, nisi in lingua, quam ipsi noverunt, qualiter et faciunt omnes advocati in Francia, etiam in curia parliamenti ibidem. Consimiliter Gallici, post eorum adventum in Angliam, ratiocinia de eorum proventibus non receperunt, nisi in proprio idiomate, ne ipsi inde deciperentur. Venari etiam, et jocos alios exercere, ut talorum et pilarum ludos, non nisi in propria lingua delectabantur. Quo, et Anglici ex frequenti eorum in talibus comitiva, habitum talem contraxerunt, quod huc usque ipsi in ludis hujusmodi, et compotis, linguam loquuntur Gallicanæ: et placitare in eadem lingua soliti fuerunt quousque mos ille, vigore cujusdam statuti, quam plurimum restrictus est; tamen in toto hucusque aboleri non potuit, tum propter terminos quosdam, quos plus proprie placitantes in Gallico, quam in Anglico, exprimunt, tum quia declarationes super brevvia originalia, tam convenienter ad naturam brevium illorum pronuntiari nequeunt, ut in Gallica, sub quali sermone declarationum hujusmodi formulæ addiscuntur."

Suetonius says, that Caligula, when he intended to take advantage of his penal edicts, caused them to be written in so small characters, and to be hung up at such a height, that no one could read them. This Hayward, in his Life of William the Conqueror, applies to the English laws being in French.

[o] There is an ordinance of Cromwell's (in Scobell's Collection) for the translation of all the law reporters from the old law French into English. The same ordinance directs all the law proceedings to be translated from English into Latin.

[p] There is at least no mention in the edition of the Irish statutes, published by authority, of their having been translated.

[q] *Basnage* is therefore most grossly mistaken, when he asserts, that the Normans are the only nation in Europe, whose antient laws and customs are not in the Latin language.

ty [r].

ty [r]. They may probably indeed have fixed that language, as the translation of the Bible is said to have fixed our own [s]. The antient laws of Sicily are in Latin; and the same may be said of other Italian states.

At the beginning of the sixteenth century, a return was made of all the laws and customs of the different provinces of France. These have been collected and published by Du Moulin, in two very large volumes, *folio*. The only collection of these customs, which is in the Latin language, is those of Thoulouse; all the rest are in the provincial dialects or patois; and from those provinces which border on Spain, the language used is the Basque, or a corrupt mixture of French and Spanish [t]. The reason generally given for our laws being in the French language, viz. that it was the will of the conquering Normans, is by no means satisfactory. If this was the true reason, the laws, from William the First to the reign of Henry the Third, would have been in that language. Now, in the Collection of these laws published by Wilkins, there is but one such instance, and that is printed as being a translation from the Latin, which is considered as being the original. Besides this very conclusive proof, there is no French record in Rymer's most large and stupenduous collection, till the year 1256, and 40 Hen. III. [u]. which Collection begins above a century before, viz. in the year 1101, during which period every record is in Latin. And agreeable to this remark, the present statute (the first in the French language) is just two centuries after the conquest. What might have contributed to continue our laws in the French language after this first instance, seems to have arisen from there being a standing

[r] See the Observations upon Magna Charta.

[s] There is a Spanish letter, from the Black Prince to the Count of Trastamara, which scarcely differs either in the language or spelling from that of the modern Spanish. Rymer's Foed.

[t] This fully proves that Bullet is mistaken, when he asserts, in his Preface to the *Diët. Celtique*, that all the laws of France were in Latin till the time of Francis the First.

[u] Vol. ii. p. 13. Hague edition. The first English record in Rymer is in the year 1386; it is scarcely however intelligible to a modern Englishman. After this, there are some few English records, which begin with the reign of Henry the Fifth; and particularly the postscript to a letter by that king. Rymer, vol. ii. part i. p. 152.

committee in parliament to receive petitions from the provinces of France, which formerly belonged to the crown of England; and as these petitions were in French, and the answers likewise in that language, it might probably be a reason why all the parliamentary transactions should be in French by way of uniformity [w]. This conjecture seems to be strongly confirmed by the statutes having continued to be in English, from the time in which we fortunately were dispossessed of the French provinces, as most of the statutes, in the reign of Henry the Sixth, continue to be in French.

Another reason for the statutes being in French, arose from the general affectation which prevailed at this time of speaking the French language, insomuch that it became a proverb, that *Jack would be a gentleman, if he could speak French* [x]. It was very corrupt indeed; and therefore Chaucer [y] says,

“Entwained she her voice full seemly.

“And French she spoke most feteously;

“After the schoole of Stretford at Bow,

“For French of Paris was to her unknowe”

It was however so necessary, that Robert of Englefield, who founded Queen's College in Oxford, and was confessor of Philippa of Hainault, queen of Edward the Third, directed, by his statutes, that the scholars should either speak French or Latin [z].

But the strongest reason for permitting our laws to be in the French language arose from the English, and the inhabitants of the French provinces, under the English dominion, considering themselves in great measure as the same people [a].

[w] This likewise seems to be the reason of a law receiving the royal assent in French, which, as foreigners generally attend that ceremony, should be abolished. I have heard of its being difficult to translate these old forms: I should conceive that these three words would answer every purpose, and unexceptionably; *BE IT SO*. The forms might likewise be translated literally into English. Oliver Cromwell, when protector, used these words: *The Lord Protector doth consent*. See Whitl. Men. p. 661. A. D. 1657.

[x] Verstegan mentions this proverb, but says, that some of the English adhered strongly to the use of their native language; and that he had himself seen many monuments of the ancient English in Normandy, which were in English p. 182.

[y] Prologue to the *Priores's Tale*.

[z] Fuller's Worth. p. 222.

[a] This holds at present with regard to the inhabitants of Jersey and Guernsey.

The lawyers of the time therefore not only made use of it in their pleading, but conversation: thus, Chaucer [b] makes his man of law say,

Hofte (quoth he) de pardeux jeo assent.

We never hear, in the very antient chronicles, of that national animosity subsisting between the English and the French [c], which hath since been occasioned by the long and obstinate wars during the reigns of Edward the Third and those of Henry the Fifth and Henry the Sixth. And still more by Louis the Fourteenth affecting the monarchy of Europe. It was reserved for the reign of Louis the Fifteenth, in a royal edict, to style the English *nos veritables ennemis* [d].

I cannot conclude these observations without taking notice, that the present statute of Henry the Third, in French, is inserted between others in Latin; and that, during the same session of parliament, there is an instance, in the statute of Westminster the second (which is, properly speaking, a *Capitularium* [e]) of French chapters being inserted in the same law, preceded and followed by chapters in Latin.

From a very diligent and attentive perusal of the Statute-book, the best general rule which can be given with regard to an act of parliament's being in Latin or French, is, that, when the interests of the clergy are particularly concerned, the statute is in Latin. I do not however pretend to say, that this rule is without exceptions.

[b] Prologue to his Tale.

[c] The foreigners, against whom the clamour at this time ran the strongest, were the Italian clergy, who procured the most lucrative benefices from the court of Rome, to the prejudice of the native English. This clamour occasioned very dangerous riots in the reign of Henry the Third. Carte, vol. ii. p. 34.

[d] We do not find that the alliance between Cromwell and the French was an unpopular measure even so late as the last century. Nor in the century before was the English nation at all alarmed with the proposed alliance between Queen Elizabeth and the Duke of Anjou.

[e] See the Notes on Magna Charta, p. 1.

STATUTUM DE MARLEBRIDGE [S].

52 Hen. III. A. D. 1267

THIS is the last statute in the long reign of Henry the Third, and it contains many wise regulations with regard to civil property, which had been in a very precarious state during the preceding troubles. Of this, if other proof was wanted than the general histories of the times, it would be sufficient to read the *Edictum de Kenilworth*, which was made the preceding year, and which is printed in most editions of the statutes. The first chapter relates to distresses, which, it hath already been observed, were most oppressively used. If complaint was made of this oppression, the barons insisted upon determining the complaint against their own officers in their own courts, and would not permit the king's courts to hold consuance. It hath already been remarked on the twelfth chapter of the statute of Merton, which was made two and thirty years before the present law, that the king refused his assent to an attempt of the same kind, when the barons insisted upon deciding all offences committed in their own forests, and warrens, by their own jurisdictions. Those powers which they could not obtain from the king, they exercised (as it appears by this statute) during the ensuing troubles; and it was high time to put a stop to these enormities and violations of justice, which was effected by removing the complaint from the court of the Great Baron to those of the King, where the judges were indifferent between the oppressed peasant and the tyrannical lord.

[S] Marlebridge, where this parliament was held, is supposed to be the same with the town at present called Marlborough, of which there seems to be some reason to doubt, as the terminations are very different. In Saxton's maps, this town is spelt Marlingesboro. The city of Lincoln, in the old statutes, is however always called Nicoll or Nichole, which is a greater variation from the modern name.

C A P.

CAP. XI.

Provisum est etiam, quod nec in itinere justicæ, nec in comitatibus, in hundredis, nec in curiis baronum de cetero capientur fines ab aliquibus pro pulchre placitando,] Sir Edward Coke is very anxious to explain, that this fine was not imposed upon the pleader for his mistake, but that it was payed by the party, for leave to amend a bad plea [g]. He does not however cite any record or authority in proof of what he asserts, and (*pactanti viri*) I should imagine that this fine was payed by the pleader, who was certainly the most in fault. In other countries, advocates have been subjected to penalties even for prolixity [b], and particularly by an ordinance of Charles the Seventh of France; as also many to the same purport by his successors [i]. This power of fining for a bad plea however (whether it might be imposed on the party or the advocate) had been undoubtedly much abused, and particularly in the inferior courts, where the fine was payed to the lord. And we find by the nineteenth chapter of the present statute, as well as by an article of Magna Charta, that the power of amercing was equally abused in the inferior courts, and for the same reason.

[g] The opinion of Sir Edward Coke with regard to this fine *pro stultiloquio*, is what he says in his 2d Inst. p. 122. In the Preface however to his Book of Entries, when he had occasion to be more accurate on this head, he allows that at common law this fine was payed by the pleader, and not by the client. His words are these: "Radulphus de Bardfield qui *narravit* pro filio Furoldi in misericordia pro stultiloquio;" and cites a record of 5 Hen. III. (adding by way of comment) "quod inter alia acta publica evincit manifeste juridicum ea tempestate, non clientem multatum fuisse; iniquum enim censebatur clientem poenas luere pro delicto jureconsulti, quod sane nihil aliud fuisset, quam in miserum cumulasse miseriam." He then adds, "Dominus Robertus de Willoughby anno 24 Edw. tertii jurisperitos ad septum curiæ allocuturus dixit, *Jeo ay view le temps que si vous ussez plead an erroneous plea, que vous alastes al prison.*" By a statute of James the First of Scotland the advocate is to take the following oath:

"Illud juretur, quod lis sibi justa videtur,
 "Et si quaeretur, verum non inficietur;
 "Nil promittetur, nec falsa probatio detur,
 "Ut lis tardetur, dilatio nulla petetur."

[b] In the court of sessions in Scotland, the lords have to this day an hour-glass before them.

[i] See Ord. Royales, Paris 1552.

C A P. XXVI. XXIV.

JUSTICIARII itinerantes de cetero non amercient villatas in itinere suo, pro eo quod singuli xii annorum non venerint coram vicecomitibus et coronatoribus, ad inquisitionem de roberiiis, incendiis domorum, vel aliis ad Coronam spectantibus faciendis. Dum tamen de villatis illis veniant sufficientes, per quos inquisitiones huiusmodi plene fieri possunt, exceptis inquisitionibus de morte hominis faciendis, ubi omnes xii annorum venire debent, nisi rationabilem causam habeant absentiae suae.]

It was an ancient regulation of police, that every inhabitant of a county, who was above the age of twelve years, should attend the sheriff's turn in order to hear the *capitula coronae* read over, and given in charge. This, before the establishment of justices in Eyre, was the only opportunity of their being instructed with regard to the crown law, and it was probably supposed that such a charge would not only be understood by a child above that age, but make a very lasting impression. As it was very inconvenient however and expensive for all the inhabitants of a county to attend, the statute of Magna Charta very properly confines these *turns* [k] (as they are called) of the sheriff to be held only twice in a year; but as whole townships were frequently amerced for neglecting to attend, this statute dispenses with such attendance, provided there is a jury, consisting of a sufficient number to punish offenders. It excepts indeed the case of murder, which crime the legislature thought it incumbent upon every one to attend either to prosecute, or to conceive a just horror of. There was at this time another great abuse in prosecutions for murder, which is regulated by the next chapter; the words are, "*Murdrum de cetero non ad-*

[k] Magn. Chart. c. 23. Stiernhook gives the best account of the signification of this word *turne* or *turn*. "Judicia antiquitus *Hwarp* dicta fuerunt, quæ vox hodie circuitum, revolutionem, seu vicissitudinem, significat, sive quod judicia ad revolutiones solares vel lunares haberentur, sive quod in unum conveniens multitudo judici circumfusa conglomeraretur, sive denique quod per vices, facto circuitu singuli territorii, patresfamilie ad judicia convenire tenerentur, prout in antiquo et novello jure præceptum existat." Ch. 2. This agrees with the common meaning of the Saxon word *torne* and English *turn*, and the sheriff's court so called was held for these very purposes. The bishop of Dumblain, in Scotland, had a writ on this chapter of the statute of Marlebridge. See Prynne's Records, vol. iii. p. 183.

"judicetur,

STATUTUM DE MARLEBRIDGE 57

"judicetur, ubi infortunium tantummodo adjudicatum est; sed
"locum habeat murdrum de interfectis per feloniam tantum."

The word *murdrum* is in the common translation very improperly translated murder [1], whereas in this place it signifies a fine imposed upon a township, where (as Bracton expresses it) *occulta hominis occisio intervenerat*. If the township did not produce or prosecute such a murderer, it was but a proper punishment to fine the inhabitants for such neglect, or concealment. I have before observed, that fines imposed by the sheriffs was antiently one of the great branches of the king's revenue; and we therefore find that the power was always perverted from the purpose of justice, to the filling the king's coffers, especially if there was an opportunity of fining a whole district, as such fine was proportionably larger. If a man therefore was killed *per infortunium tantum* [m], as the statute expresses it, the township was equally amerced, as if a secret and concealed murder had been committed.

[1] Thus Du Fresne informs us, that *adulterium*, in old records, signifies the fine imposed, and not the offence. This word however signified sometimes, in the old Saxon laws, what we now understand by it. For example, there is a chapter amongst the laws of Canute, *De mūdō occulte perpetrato*. Dec. Script. p. 915. And by the Swedish law also, "qui alium trucidat et abscondit, morder dicitur." Themis Romano-Suecica, Gryphiswaldiae, p. 210. It were to be wished, that the writers on the crown law would call man-slaughter (a word that conveys no precise idea) by the old Saxon word of *febbe* (the same with *fight*), and which therefore signifies what is now meant by the word *man-slaughter*, i. e. the killing a man upon a sudden provocation, such occasions a fight or scuffle. By the law of Scotland there is no such thing as man-slaughter, nor by the civil law; and therefore a criminal indicted for murder, under the statute of Henry the Eighth, where the judges proceed by the rules of the civil law, must either be found guilty of the murder, or acquitted.

[m] The law of Spain is so far from allowing a forfeiture in a case of accident or self-defence (of which there seems to have been some doubt amongst our writers on the crown law), that it exhorts every one to make use of it, "ca meyor miente que vive que se defenda, que dexar que lo venge depoy su morte." Fuer. Jusg. p. 330. *for it is better that he should defend himself when alive, than to leave it to others to avenge him when he is killed*. Self-defence is indeed forbid by the law of Japan; Kempfer (who from his two years residence in that country must have been well informed) says, that if the aggressor is killed, the person killing must equally suffer, having only permission to kill himself. The Japanese are not only *retro divisus* arde by situation; they are still more so by their laws and customs.

C A P. XXIX.

SI clericus aliquis pro crimine aliquo, vel recto, quod ad coronam pertineat, arrestatus fuerit, et postmodum per preceptum domini regis in ballivum traditus [fuerit] vel replegiatus extiterit, ita quod hi quibus traditus fuerit in ballivum, eum habeant coram iusticiariis, non amercientur de cetero illi quibus traditus fuerit in ballivum, nec alii pleg sui, si corpus suum habeant coram iusticiariis, licet coram eis propter privilegium clericale respondere nolaerit, vel non potuerit propter ordinarios suos.] When the great dispute first began between Henry the Second and Thomas of Becket, it arose from this privilege claimed by the clergy (or rather the archbishop), which that wise king endeavoured to abolish. The arguments *pro* and *con* may be seen in Fitz-Stevens's Life of Thomas of Becket, who was his archdeacon, and present at the assassination. It is not only the curious anecdotes which commend this life of Thomas of Becket, but the style, which is in some parts indeed too figurative, but shews a very familiar knowledge of the classical poets. The Latinity of the writers, during the reign of Henry the Second, was more pure than in many of the following ones. It hath indeed been too generally presumed, that the monks of these times were ignorant of classical learning, from Caxton speaking (in one of his Prefaces) of Virgil's *Æneis* as a story then hardly known, and without any commendation of the poetry; but it appears by Fitz-Stevens, that there were schools in London during the reign of Henry the Second, in which he says, that the scholars daily *torquent enthymemata* (an expression which shews he was well versed in Juvenal [n]); from which and many other circumstances it may be inferred, that learning had at this time made no inconsiderable progress.

I have now made some observations upon nearly all the statutes of the reign of Henry the Third [o]; and as they are the most authentic materials, upon which any history can be

[a]

curtum sermone rotato
Torqueat enthymema. Sat. vi.

[o] All except the two statutes entitled the *Dies Communes in Banco*.

founded, I cannot but say, that he by no means deserves to be considered in so contemptible a light, as he hath generally been represented [p]. The truth is, that, in the earlier parts of the history of any country, we are apt to read it as a romance, in which he who fights the greatest number of battles in person, is the hero of the tale and wonder of the reader.

sævas curre per Alpes,
Ut pueris placeas.

The reign of Henry was not set off with the glare of conquest, but as a legislator he certainly had uncommon merit; and if it is alledged, that the confirmation of the two Great Charters was extorted from him, the laws against the oppression of Revenue-officers [q], and the wise and beneficial regulations of the statutes of Merton and Marlebridge in opposition to the tyranny of the barons, must be allowed to him on the other side of the account. We shall find in the course of these observations, that some of the reigns of those kings, so much celebrated for their conquests [r], produced laws of infinite oppression: the time will come, when a king revered

[p] It is not by this intended to insinuate that he was a perfect character, or a truly great king, but only that his disposition seems to have been good. He had the misfortune to come to his crown between the age of nine and ten, and there are few instances of a king who comes so early to his throne answering the expectations of his people. In our own history, Richard the Second and Henry the Sixth are striking instances of this observation, for which there seems to be an obvious cause, as a minor king hath generally a worse education than he who is only destined to a throne. Flattery hath often been said to be the bane of crowned heads; and an infant king, exercising most acts of authority in his own person, is easily taught to conceive more highly of himself than a mortal should do. A most extraordinary instance of this prostitution of adulation to a minor king is mentioned by Fabian, "in his Chronicle, which I shall give in his own words. " Henry the Sixth, when " but eight months old, sat in his mother's lap in the parliament chamber, and " the speaker made a famous *preposition*, in which he said much of the providence " of God, who had endowed the realm with the presence of *so toward a prince* " and *soveraign governor*," p. 410.. As men advance in years, some new wants must arise, new powers grasped at, and new desires gratified, otherwise there is an insipidity even in the possession of a throne. When a minor king therefore arrives at more mature years, the common pre-eminences of his station begin to pall, which he hath already so long exercised and enjoyed. Might it not possibly be owing to the minority of Louis the Fourteenth, that, tired of being considered as king of France only, he at last involved his own country and Europe in such distresses, by affecting the general empire of it?

[q] Statutum de districtione Scaccarii.

[r] I will just mention, by way of instance, the statute of *quo warranto* of Edward the First; and which Hollinshed likewise informs us to have been enforced in Ireland by Edward the Third. See observations afterwards on this statute; and likewise the 2 Hen. V. ch. vii. against Hereticks.

by Europe, adored by his subjects, having no occasion to repel the invasion of an enemy, nor crush a home-bred rebellion, will shew that a steady attention to the true welfare of his people will form the most amiable and respectable character in history, without his having become the general of his army.

WEST M.

WESTM. PRIMER.

3 Edw. I. A. D. 1272.

CEUX sont les establisments le roy Edward fitz le roy H. faits a Westm. a son primer parliament general apres son coronement, lendemain de la cluse de Pasche, lan de son raigne 3. per son counsel, et per lassentments des Archievesques, Evesques, Abbes, Priors, Counties, Barons, et tout la Comminaltie de la terre illongues summones :] This parliament was not held by Edward the First till the third year of his reign, on account of his being in the Holy land [s] at the death of his father. The preamble to this statute makes the first use of the word Parliament, which is said to be a general one; per son counsel, et per lassentments des Archievesques, Evesques, Abbes, Priors, Counties, Barons, et tout la Comminaltie de la terre illongues summones. The last words tout la Commonaltie de la terre, seem to explain what a general parliament was, in contradistinction to a more confined one, where perhaps only lords and prelates attended [t]. The word Parlement, or Parliament, was by no means restrained at this time to the signification of a convention of the king, lords, and commons, as it is used at present, but signified nothing more than a conference. In this sense Froissart frequently uses the word, as p. 136. *les Chevaliers Francois et Anglois qui au parlement etoyent venus*. So Thomas Wykes, in his Chronicle, says, *Rex Edwardus habiturus parliamentum cum Lewelino principe*. Thus also Gower [u], speaking of a transaction in Greece, says,

[s] He had been out of the kingdom on this expedition nearly five years, viz. from 1269 to 1274.

[t] In the Chronicle of Thomas Wykes it is said, "Quod anno 1284, Rex Edwardus venit Bristoll, et habito ibidem cum quibusdam regni sui magnatibus non universali, sed tanquam particulari, et speciali parlamento." Gale. vol. iii. p. 112. "Sous les deux premieres races, on assemble souvent la nation, c'est a dire les Seigneurs et les Eveques: il n'etoit point encore question des Communes." Montesq. l. iii. p. 176. Duodecimo.

[u] Confessione Amantis, l. iii. p. 53. B.

“ The Lordes of common assent,

“ The time set of *parlement*.”

Lord Coke's etymology of the word Parliament, from *speaking one's mind*, hath been long exploded; if one might presume to substitute another in its room, after so many guesses by others, I should suppose that it was a compound of the two Celtic words, *parly*, and *ment* or *mend* [w]. Bullet renders *parly* by the French infinitive *parler*; and we use the word in English as a substantive, viz, *parley*; *ment* or *mend* is rendered *quantite*, *abondance*; the word Parliament, therefore, being resolved into its constituent syllables, may not improperly be said to signify what the Indians of North-America call a *Great Talk*.

Having risked this conjecture upon the etymology of the word Parliament, on which so much hath been already hazarded by different writers, I shall now proceed to consider some of the chapters of this collection of laws, which is generally styled Westminster the first, to distinguish it from another collection of laws made by Edward the First, in a parliament likewise held at Westminster in the thirteenth year of his reign, and which is therefore called Westminster the second. I have already observed from the words of the preamble, that this was a *general parliament* [x], and the attendance was the greater, as the same opportunity was taken to swear allegiance to their new king, who was in the Holy land at his accession to the throne. The chronicles therefore call this *famosum et solemne parliamentum*.

The first chapter (according to Sir G. Mackenzie's observation before alluded to in the Comment on Magna Charta, ch. 1.) begins with a declaration of the rights of the clergy. The crown in all countries have always thought it good

[w] Both these words are to be found in Bullet's Celtick Dictionary, published at Besançon in 1754.

[x] Those who have an inclination to see all the learning which hath been collected, with regard to the commons having been anciently a part of the legislature, may consult Tyrrel's Bibl. Polit. It seems to be at present little more than a point of speculation, for the discussion of an antiquary. I will only say, that no one can read the old historians and chronicles, who will observe the least allusion or trace of it, if he does not sit down to the perusal with an intention of proving that they formed a component part. It is an indisputable proof, that feudal tenures were not known to the Saxons, by their having no terms for such tenures; and it is as strong a proof, that there is no direct mention of the intervention of the commons by the old historians,

policy to procure the support of this body of men; and a king just then arrived from a religious expedition, was undoubtedly willing to promote what was represented to him as beneficial and advantageous to their interests. It appears by the thirty sixth chapter of Magna Charta, that bequests to monasteries had even then extended so far, that it was thought necessary to restrain them. The clergy were not contented however with engrossing estates to the disinheritance of heirs, and near relations; but by this statute insisted to hold these estates without any burthen or inconvenience whatsoever. At this time there was little or no accommodation for travellers, especially if they travelled with a suite [y]. Here and there a castle was indeed to be found; but the great baron who was the owner rather considered the strength of the fortifications, than any conveniences of reception. The religious houses, on the other hand, being protected by the sacred characters of those who lived in them, had no occasion to expend any thing with a view to their defence, and had nothing to consult but what might contribute to accommodation. It was not sufficient to provide lodgings merely for their own body; their benefactors, at the same time that they disinherited their heirs, commonly gave them what was called a *corrody* [z], and which was the general annuity and provision to prevent their poor relations from starving. The monasteries were therefore to subsist these annuitants during their lives, who, as they died off, left a vacant bed (if not an apartment) for the reception of the traveller. Besides this, provisions could not every where be procured [a], and the monastery had always such a provident care for themselves, that the addition of a few mouths was scarcely felt. The clergy however, now in full possession of their large estates, began to repine at this occasional and trifling inconvenience, and possibly, during the troubles of the late reign, they

[y] The lodging the king's officers, and particularly the justices in Eyre, and sheriffs, who had many attendants, is complained of.

[z] See 9. Edw. II. ch. i.

[a] There were few or no markets to supply the country; and therefore it is another regulation of this chapter, that the religious houses shall not be obliged to sell their provisions. They were at this time the only inns, and were therefore treated as such; and yet, by this part of the law, they endeavoured to put a stop to this their only use to society,

might have been over-loaded with guests on their march from one part of the country to another. They therefore, by the first chapter of this law (and which is a very long one), procure a declaration, that no one is to lodge in their monastery without their consent, alledging, "*quils font ci abates et impoveris que ils ne poient eux mesmes susteigner.*" It is believed, however, if it had been necessary to prove this allegation, that the proof must have been offered to a committee in parliament very favourable to their interests.

Similar causes will always produce similar effects, and therefore we find that Philippe le Bel made an ordinance, "*que les juges n'yront en eglises ou abbayes, pour disner ou giser, sans grande cause ou occasion [b].*" And by a canon of Pope Boniface, in 1295, even the clergy were limited in the number of their attendance; for an archbishop is not permitted to travel with a suite of above fifty officers, a bishop of thirty, and an archdeacon of seven: and they are likewise enjoined not to travel with hounds or hawks. The next year a writ issued to the Abbot of Bellieu, grounded on this chapter of Westminster the first [c].

C A P. XII.

PURVIEW est ensement, que les felons eseries, et queux font appertment de male fame, et ne soy voient mettre en enqueste des felonies que l'on mette sur eux devant justioes a le suit de roy, soyent mises en la prison fort et dure, come ceux queux refusent estre al comen ley de la terre.] Lord Chief Justice Hale [d] says, that the punishment of pressing to death did not arise from this statute, but was anciently a punishment by the common law. The words of the statute are, that notorious felons qui ne soy voient mettre en enquestes des felonies, soyent mis en la prison fort et dure." As this law therefore is so highly penal, I cannot think that judges, who have tied the thumbs together of criminals, in order to oblige them to plead, can be justified under these words of the

[b] Or

d. Royales, p. 1.

[c] See Prynn's Records, vol. iii. p. 180.

[d] History of the Pleas of the Crown.

statute, though their intentions have been merciful [e]; especially as whatever might have been the common law, this statute hath superceded it. *Prisone forte et dure*, can mean nothing further than, if the criminal will not submit to a trial, he shall be remanded to a most close and severe confinement; how is it possible then to include pressing to death, with all its apparatus of torture, under these words; especially, as the felon, when convicted, had his benefit of clergy? There is a record in Rymer [f], which proves beyond dispute, that what is contended for is the true meaning of these words of the statute, and that it was nothing more than a confinement without any nourishment, which was justified under the word *prisone dure*. “*Rex omnibus &c. cum Cecilia, quæ fuit uxor Johannis de Ryge-way, nuper indictata de morte viri sui &c. pro eo quod se tenuit mutam et ad pœnam suam exstitit adjudicata ut dicitur, in qua sine cibo et potu in arcta prisona per quadraginta dies vitam sustinuit via miraculi, et contra naturæ ordinem; nos ea de causa pietate moti perdonavimus,*” &c. This pardon was granted by Edward the first, in the thirty first year of his reign, and is therefore a *contemporanea expositio* of his own law. Notwithstanding Lord Chief Justice Hale asserts, that this punishment was by the common law, Bracton takes no notice of it, who is supposed to have written in the preceding reign. Britton, on the other hand, (who is generally agreed to have written after this statute, [g]) mentions the punishment, “*si les felons ne se violent acquitter, si soient mis a leur penance jusqu a tantquils ne pledent,*” The statute says, that only notorious felons are to be thus confined; and therefore in an appeal, where the supposed guilt was not so strongly proved as when there is an indictment found by a grand jury, the prisoner was not subjected to this punishment.

[e] It appears by the Sessions Paper, that this was practised at the Old Baily in the reign of Queen Ann, and perhaps there are later instances. In the reign of James the First, Calverly stood mute when tried for murder, and was pressed to death. Stow's Chron. p. 872.

[f] Vol. iii. part xi. p. 137.

[g] Sir Edward Coke indeed supposes that Britton was published in the fifth year of this king's reign, which is two years after this statute. The learned antiquary Bishop Nicholson supposes the author to have written in the reign of Edward the Second.

The first question, with regard to the *peine forte et dure* (a word substituted instead of *prisonne forte et dure* (is in the Year Book of 8 Hen. IV [b]. A criminal, on an appeal for murder, pleaded *not guilty*; and upon being asked, according to the common form, how he would be tried [i], would make no further answer: upon this, the court doubted whether he should be hanged, or ordered to suffer the *peine forte et dure*. Though all the judges were met in the Exchequer Chamber upon this doubt, it does not appear that it was finally decided, notwithstanding the clause in this statute was under their consideration, as the report of the case concludes by citing it. The next case in the Year Books, which relates to the *peine forte et dure*, is in the 14 Edw. IV [k], where the form of the judgment is first given. The Marshal of the king's Bench is ordered to put the criminals into *diverses measons bases et estoppes, que ils gisent par la terre tous nuds forsque leurs braces, que il mettroit sur chascun d'eux tant de fer et poids qu'ils puissent porter, et plus issint qu'ils ne se puissent lever, et qu'ils n'aver ascun manger, ne boire, si non le plus pier pain qu'il puissent trouver, et de leau plus pres al gaole (excepte eau courant) et que le jour qu'ils ont pain qu'il n'ayent de leau, et e contra, et qu'ils gisent issint tantqu'ils furent morts*. Notwithstanding this conclusion of *tantqu'ils furent morts*, we find in the Year Book of 8 Hen. IV [l], that one of the judges, in a question relative to this punishment, says, that the criminal may live many years after having suffered the punishment.

The form of this judgment seems to have been never strictly adhered to, as that which hath been above cited differs, in some particulars, from the form in Rastal's Entries, and consisting of such very minute directions, could not probably have been at once settled [m]. There is likewise, in Babing-

[b] T. Mich.

[i] I cannot here help observing, that the common question asked the criminal, viz. *Culpis, how wilt thou be tried?* is improperly answered, *By God and my country*. It originally must have been, *By God or my country*, i. e. either by ordeal or by jury; for the question asked, supposes an option in the prisoner.

[k] P. 7.

[l] T. Mich. fol. 1.

[m] See Stanford's Pleas of the Crown, p. 150, & seq.

ton's advice to Grand Jurors, another form of this sentence, which differs in this, that the criminal is to drink but three times in a day, which must be a great addition to the torment, as the agony probably must bring on a violent thirst and fever, which happens also to those who are broken on the wheel. Hollinshed likewise takes notice of another circumstance in the punishment as used in his time, viz. that the back of the criminal was placed upon a sharp stone [n]: other precedents mention the tying of the arms and legs of the criminal with cords fastned at different parts of the prison, and extending the limbs by these cords as far as they could be stretched.

From this it appears, that there is no settled form of this terrible judgment, which is contrary to a fundamental principle of the criminal law of England in capital offences; and no one form (at least that I have happened to meet with) takes notice of the preparatory torture of tying the thumbs with whipeords, which, though mercifully intended to prevent the more severe punishment by obliging the criminal to plead, cannot (it should seem) be justified. As it is very unusual for criminals to stand mute on their trials in more modern days, and it was not unfrequent if we go some centuries back in the English History, it may not be improper to observe, that the occasion of it was to prevent forfeitures, and involving perhaps innocent children in the consequences of the parent's guilt. These forfeitures only accrued upon judgment of *life and limb*, and, to the disgrace of the crown, were too frequently insisted upon and levied with the utmost rigour. It however still continues to be part of the law of this country; and I have already mentioned an instance in the reign of Queen Anne, of putting this sentence in execution, and perhaps more instances may have happened even since that time.

I should conceive upon the whole, that the words in the present statute, which have occasioned these observations, viz. *prison forte et dure*, have been misconstrued, by substituting in the room of *prison*, the word *peyne*. The record cited from Rymer proves beyond a possibility of doubt, that, soon

[n] Vol. i. p. 135.

after this statute, the punishment was merely imprisonment, and an injunction to the officers, in whose custody the criminal was, not to provide him with any nourishment. I should imagine, that the alteration in this punishment, by the different tortures afterwards used, arose from justices in Eyre, and justices of Gaol-delivery not staying above two or three days in a county town, and who therefore could not wait for this tedious method of forcing the criminal to plead; as the record from Rymer shews, that, in the instance already observed upon, the criminal had been forty days in this close confinement. It seems likewise clear, that, whatever this punishment might have been by the common law, this statute hath superceded it; and it is a presumption (against even so great authorities as Lord Chief Justice Coke, and Lord Chief Justice Hale) that there was no such punishment by the common law, as it is admitted that a traitor cannot receive this punishment, because the words of the statute confine it to the case of felons; the argument is also very strong, that, if felons were subjected to this sentence, traitors would still less have escaped it.

After all, the having recourse to this punishment, when the criminal stands mute and will not plead, seems to be very unnecessary. The common reason given, that the criminal must acknowledge the jurisdiction of the court, seems not to have much weight. If the court knows they have the power to try him, what signifies this forced acknowledgment of their jurisdiction [e]? It would be much more reasonable to adopt the practice of the Scotch law, "If the criminal stands mute and will not plead, the tryal proceeds as usual, and it is left to the criminal to manage his own defence as he shall think proper [p]."

As I have had occasion to mention the different tortures to which the criminal hath been subjected by the varying of the punishment of the *peyne forte et dure*, I shall here endeavour to prove what I have asserted at the end of the Comment on Magna Charta, that torture was formerly not unknown in this country. Torture was used by the ancient Germans, from

[e] Lord Bacon, in his *Apothegms*, mentions a Welshman having supposed the judge to be a fortune-teller, from the ceremony of the criminal's holding up his hand at the bar.

[p] Innes's *Sum. View of the Scotch Law*.

whom we are supposed to have derived our laws [9]; and therefore its being used in most of the countries of Europe does not arise perhaps entirely from their having adopted the civil law. The Institutes of Justinian were discovered at Amalfi, in the year 1127; and, though less of the Roman law hath been introduced into that of England than any other country of Europe [7], yet certain parts of it have, undoubtedly, been incorporated. The beginning of the Preface to Glanville is most clearly an imitation of the introduction of Justinian, and not only the Norman kings [1], but the Italian clergy, who possessed the best benefices in the kingdom, must be supposed to have never lost an opportunity of interweaving from time to time, parts of the Roman into our municipal law. The denying a felon to make his defence by an advocate, and the not permitting his witnesses to be examined upon oath [2], till the late statute (which hath always been considered as so great a hardship) seems to have been borrowed from the Roman law [3], which is indeed still more severe against the criminal, as he is not permitted to

[9] Wachter's Gloss. Germ.

[7] Duck asserts, that the Roman law prevailed in England during the reign of Domitian, and some of his successors. In justice to the authority of this writer, I cannot but mention that Giannone and other the most celebrated Civilians style him their coryphæus: we are too apt in this country to refer to foreign authors, as the Roman law is so little attended to, or practised in England.

[1] The great Papinian is supposed to have presided on the bench at York. It must be recollected likewise, that Richard the First, and Edward the First, were some years abroad in their expeditions to the Holy land. We know that Richard either made or adopted the laws of Oleron during his expedition; nor is it improbable, that Edward might have likewise desired to introduce any regulations he had seen attended with advantages when carried into execution. Bracton, who wrote in the time of Henry the Third, *de legibus et consuetudinibus Angliæ*, in the second chapter of his second book hath the following passage (as well as many others to be found in different parts of his work) from the Institutes of Justinian: "Hæc eadem species accessionis per humanæ curæ sollicitudinem potest assignari in literis. Literæ enim licet sint aureæ, perinde chartis membranisque cedunt, sicut ea solo cedere dicuntur, quæ ædificantur vel inferuntur. Sed in picturis contrarium erit, ridiculosum enim esset præciosam picturam per accessionem cedere vilissimæ tabulæ." These are the words and doctrine of Justinian in his Institutes; but it need hardly be said, that painting was not at this time arrived to such perfection in England, as to make it necessary to lay down distinctions with regard to it in the chapter of a Law-book. Bracton, besides this, eternally uses the names of *Titius* and *Sempronius*, instead of the *A.* and *B.* of an English lawyer.

[2] The Attorney General's power of filing informations *ex officio* seems to be borrowed from the civil law, where there is always a *partis publicæ*, or public prosecutor.

[3] Duck, in his treatise *De Auth. Jur. Civ.* says, that he had conversation with Noy (a great though not a good lawyer) with regard to the civil law's having prevailed

to produce any witnesses in his favour; and Montesquieu [x] gives this as a reason why perjury is a capital offence in France, and not in England. As there is a very curious paper in the first volume of the Journals of the House of Commons, which relates to this practice of the civil law, I shall here insert it [y].

Having thus endeavoured to shew that some parts of our law may have probably been borrowed from the civil law, I shall now mention the actual proofs of torture having been formerly, at least in some instances, used in this country.

prevalled in England; and that it was agreed, that the register of writs, known to be of the greatest authority in our municipal law, was drawn by men thoroughly versed in the Roman law. If that collection was made by the Masters in Chancery, it is some confirmation of what Strahan informs us, that the reason of their attendance in the House of Lords was originally to be consulted upon points of civil law.

[x] *Esprit des Loix.*

[y] *Die Jouris, 4^o Junii, 1607.*

A paper was delivered to, and read by, Mr. Speaker, declaring the manner of proceeding in Scotland for point of testimony, upon trials in criminal cases for satisfaction of some doubts.

"In Scotland, in civil causes before the civil judges, witnesses are admitted for probation, but that only in favour of the pursuer; for the defender would prove against the libel, if he had the benefit of witnesses, which is altogether unlawful. And therefore in many civil actions, the defendant will press by all means, either by another cross libel, or by one trick or another, to change the nature of his cause from a defender to a pursuer. In criminal causes, by the civil law, there is no jury called upon life and death; and therefore the judges admit witnesses in favour of the pursuer, but none in favour of the defender; because in all causes (either criminal or civil) no man can be admitted to prove the contrary of his own accusation, for it is his part who relevantly alleges the same to prove it. As if A. accused B. for breaking his stable, and stealing his horse such an hour of the night; the pursuer may be well admitted to prove what he hath alleged, but the defendant can never be admitted to prove that he was *alibi* at that time, for that would be contrary to the libel, and therefore most unformal. In Scotland we are not governed by the civil law, but *ordanes* (ordinaries probably), and juries are to pass upon life and death much the same as here; which jury, as it comes from the neighbourhood where the fact was committed, is presumed to know much of their own knowledge, and therefore they are not bound to examine any witnesses, except they choose to do it on the part of the pursuer; but this is not lawful to be done in favour of the defendant. It is of truth, the judge may either privately before hand examine *ex officio* such witnesses as the party pursuer will offer to him; and then when the jury is publicly called, he will cause these depositions to be read, and likewise examine any witnesses which the pursuer shall then desire, but never in favour of the defender." This paper was delivered to the Speaker, with regard to a trial of one Barrett in Scotland; and the further proceedings of the house thereupon, may be seen in the Journals, vol. i. p. 378 and 379. The king sent a message to the house, declaring it to be his gracious opinion, that no one by the law of Scotland could take upon himself *patrocinium latrocinii*.

* A grand jury in England only examines witnesses on the part of the prosecutor.

Fuller

Fuller [z] informs us, that one Hawkins was tortured in the reign of Henry the Sixth, in order to extort evidence from him; and Lord Coke [a], in the case of Lady Shrewsbury, says, that *the nobility of England are not subject to torture in crimine læsæ majestatis*; which seems to admit, that in other crimes they were subjected to it [b]. King James, in his Works, mentions, that the rack was shewn to Guy Fawkes during his examination; and yet this attempt of procuring evidence is not taken notice of by any historian or lawyer of the times, though every circumstance relative to the powder-plot must have been most publicly known, and universal matter of conversation and disquisition. Upon the murder of the duke of Buckingham by Felton, the question was put to the judges, whether he could be tortured in order to extort a confession [c]? They answered indeed to their honour in the negative; but the question's being asked shews, that, in the apprehension of some of the king's counsellors, they might have used torture. It is not pretended by this, that the instances were frequent [d]; and, fortunately for this country, this most horrid practice was discontinued, so that there cannot be the least legal pretence ever to revive it. Torture indeed by no means prevails so universally in the other countries of Europe as is generally apprehended: there are express laws against it both in Navarre and Biscay, though in Biscay it hath of late been permitted in treason and heresy [e]. It is used in China, and in most parts of Asia [f]: the act of union hath forbidden the use of it in Scotland.

[z] Worthies, p. 317.

[a] 12th Report.

[b] Lord Coke was attorney General at the trial of the Earls of Essex and Southampton, and he highly extols the clemency of Queen Elizabeth, who had neither used torture against the accomplices nor witnesses. State Trials, vol. 1.

[c] Rushw. Coll.

[d] It may likewise perhaps surprize the reader to find, by the 4th Eliz. ch. iv. published at length by Rastall, that the *gallies of this realm* seem to have been not an unusual punishment; and Lord Coke mentions it in his 3^d Inst. without taking notice of its being uncommon. What sort of ships or vessels these gallies were, I do not pretend to determine; the gallies of the Mediterranean, to which the French criminals are condemned, are not proper for our seas.

[e] Fuer. de Viscaya, p. 20 and 66.

[f] Du Halde, vol. ii. p. 162. Hague edit.

C A P. XXXIV.

POUR ce que plusieurs sont souvent treuve en counte-contreveurs, dont discorde ou manner discorde ad este souvent entre le roy, et son peuple, ou ascun hauts hommes de son royaume: est defendu par le damage que ad este, et uncore en pourroit avenir, que desore en avant nul ne soit si hardi de dire ou de counte nul faux novel, ou controveure, dont nul discorde ou manere de discord, ou de flandre puisse surdre entre le roy, et son peuple, ou les hauts hommes de son royaume, et qui le fra, soit pris, et detenus en tantquil a treuve en courte, celui dont le peuple sera move.] Scandal and defamation [g] must at this time have been chiefly propagated by conversation, as few could read, and still fewer could write. The ingenious and Rev. Mr. Percy [b] hath given us a satyre or libel upon Richard king of the Romans, and brother to Henry the Third, which was written by one of the adherents to Simon de Montfort, earl of Leicester. This Ballad, Mr. Percy says, affords a curious specimen of the liberty assumed by the good people of this land, of abusing their kings and princes at pleasure. As the Ballad (by a circumstance) is fixed to have been written in the year 1265, which was but seven years before the passing of the present statute, it is not improbable, that it might have occasioned this part of the law. Be this as it may, we do not find much in the Year Books, or other old Reporters with regard to this offence, till the great case, entitled, *κατ' ἔχον, de libellis famosis* [i], which is the foundation of what hath since been considered as law with respect to libels, and which was determined in the third year of King James the First, by which time printing began to be tolerably cheap.

[g] This offence is styled *lesing-making* by the law of Scotland. Forbes's Inst. vol. ii. p. 66. A law of Robert the First of Scotland makes use of almost the same terms with the present statute. It is forbidden, "that no man be an inventor of narrations or rumours by which discord may arise between the king and his people."

[b] In his curious Collection of ancient Ballads, published in 1765.

[i] Coke's 5th Report.

As every thing which relates to the publication of what may be deemed a libel, is of so interesting a nature to the liberty of the subject (ever so closely connected with the liberty of the press), I hope I may be indulged in some few observations upon the doctrine delivered in that case, and the particular circumstances which might occasion an extraordinary zeal and warmth in the court. The libel then condemned was a satyrical Ballad (at least it is stated to be a composition in metre) upon an archbishop of Canterbury, who was then dead, and likewise his successor. An archbishop of Canterbury, in more modern times, would probably have only laughed at it, or invited the author to dinner; but the then archbishop (under pretence of the insult upon the memory of his predecessor) brought the *consentem reum* before that English Inquisition the Star-chamber. The archbishop was the first judge, from his rank at least, in this tyrannical court, and therefore an insult upon the president could not but excite their warmest indignation. As the libeller is stated to have confessed both the writing and publication of the libel, the only question before the court must have been what fine or punishment they should inflict. The judges however were determined to lay down general rules, in order to suppress this growing evil, most of which will appear either to be extrajudicial, or not to be maintained; and one of which Lord Coke himself contradicted upon another occasion. The first rule is, *that if the libel is against a magistrate, it is a greater offence than against a private person.* I do not mean to controvert the reason upon which this rule is grounded, but it was most clearly extrajudicial, as the archbishop of Canterbury could not properly be deemed a magistrate. If indeed, his seat in the Star-chamber is supposed to have given him a temporal office, it must be recollected, that he sat there *pro salute animæ* of the criminals.

The next rule was not extrajudicial, but can never be supported to the extent in which it is delivered, without a limitation of time. The rule is, that, if the person libelled is dead at the time of its being written, the offender is equally punishable, as it may provoke the friends and relations of the deceased to revenge and breaches of the peace: and there is something very quaint in what follows; “ That if the dead

" person libelled is a *magistrate*, it is a *reflection on government* which never dies."

The third rule is, that it does not signify, whether the libel is true or not? This rule in the first place is extrajudicial; as the criminal confessed his offence, it is impossible, that before that terrible court he could have insisted upon having asserted nothing which was not true: this would have prevented his only chance for mercy in an intire and implicate submission after a full confession. The propriety indeed of this rule hath been adopted (and with reason) by more modern determinations; but it is remarkable, that Sir Edward Coke himself, in the case of Lake and Hutton [k], is said to have laid down the contrary doctrine.

The next rule is, that a person may be guilty of a libel by drawing a ridiculous picture, or by raising a gallows opposite to a house: both these *dicta* are most clearly extrajudicial, and it is much doubted whether there ever was such a prosecution. The last rule is, that if a libel is found, and it relates to a private person, it must be either burnt, or delivered to a magistrate, and if it relates to a public person, it must *not be burnt*, but delivered to a magistrate. Of this last rule it may be said not only to be extrajudicial, but absolutely impossible to be carried into execution. The reason of this, and the other absurdities contained in this case, arises from every one of these rules being borrowed from the civil law [l], which taking place before the invention of printing, made this last regulation at that time practicable: no one who was ever in a coffee-house will suppose it to be so at present.

[k] Reported by Hobart, p. 252.

[l] See Cod. ix. 36. The case is therefore intitled by Lord Coke, who was no great civil lawyer, *De libellis famosis*, which is the title of the chapter in the Roman law; and what severity must we not expect from a country in which, by the twelve tables in the time of the Decemvirs, a libeller was punished with death? I should conceive that the doctrine insisted upon in this case, had alarmed the famous Dr. Donne, who was then Dean of St. Paul's, as from a letter of his written at that time I have copied the following passage: "There be many cases where a man may do his country good, and service, by libelling; for where a man is either too great, or his vices too general, to be brought under a judiciary accusation, there is no way but the extraordinary method of accusation, and I have heard that nothing hath souped, and allayed the D. of Lerma so much, as the frequent libels made upon him. *Scaled letters in the Star-chamber* have now a days been judged Libels." Dr. Donne's Letters, p. 92. 4to.

Notwithstanding

Notwithstanding the observations which I have here taken the liberty to make on this very extraordinary case, I cannot conclude them without expressing my detestation of libels, which cannot be too much discouraged in a well-regulated government, nor is such restraint wanting by the Common Law, if the principles laid down in this *star-chamber* decision are not resorted to [m].

C A P. XXXVIII.

PURCEO que ascuns gens de la terre doutent meyns faire faux serment, que faire ne deussent, per que mults des gens sont desinherites, et perdent leur droite : Purvu est, que desormais, le roi (de son office [n]) durra atteint sur enquestes en plaint de terre, ou de franchise, ou de chose que touche frank tenement.] This chapter of the statute lays an obligation on the king (or rather the king's courts) to grant a writ of attaint against a jury, who have given a verdict contrary to their oaths. The translation of this part of the statute makes it rather ridiculous, than a law carrying its proper terrors against so heinous an offence. "Forasmuch as certain people of this realm doubt very little to make a false oath (*which they ought not to do*)." *do*).

It is generally agreed, that no prosecution by attaint hath been carried on against a jury for the last three hundred years; this arises partly from the more modern practice of granting new trials, and partly from the great difficulty there is in convicting, as the jury may give their verdict upon what is known to themselves, though it hath not appeared in evidence during the course of the trial. It is indeed said, that a juror having such private knowledge of a fact, should disclose it in open court; but what signifies the mere advice of a judge,

[m] Diogenes Laertius, in his life of Anacharsis the Scythian, mentions, that this philosopher, whilst at Athens, used to express his surprize, Πᾶς οἱ Ἕλληνες νομοθετεῖν καὶ τῶν ὑβριζόντων, τὰς ἀθλητὰς τιμῶσιν ἐπὶ τῷ τύπῳ αὐτῶν.

[n] *De son office* should be translated of right, and not of his office; *durra*, which follows, is corruptly for *denora*.

which cannot be enforced [o]? Attaints were so frequently brought, even so late as the reign of Henry the Sixth, that Fortescue [p] makes it one of his principal arguments for the trial by jury, that each of them, in case of a false verdict, is subject to have their lands and tenements seized into the king's hands, and their wives and children thrown out of their houses. It may therefore deserve consideration, whether this method of punishment being now totally disused may not have occasioned a most material alteration, and deviation from the principles upon which juries were originally instituted [q]. The attaint was tried by twenty-four jurors, of double the substance with the first jury; and it is to be observed, that, it lay only in civil cases, either by the common law, or by this statute. The reason of which seems to have been grounded upon the strong presumption, that no jury would condemn a criminal contrary to the evidence, and that it would be inconsistent with the principles of liberty, to permit the crown (when it might intend oppression), to call in question a verdict of acquittal. It is for the same reason when a crime is prosecuted by appeal (the remedy of a private person) and not by indictment (which is the suit of the crown), that there is no intervention of a grand jury to find the bill. Happily for this country, since that glorious æra the Revolution, the kings of England have only prosecuted as *Pater Patriæ*, when punishment hath been necessary for the safety of the whole; but when we look into trials during preceding reigns, we cannot but revere the wise and noble constitution established by our ancestors, against the vindictive prosecutions of a Plantagenet, or a Stewart.

[o] It should seem to have been understood in the time of Henry the Third, to have been the duty of the judge to controul the verdict of the jury, "*Sed cum ad judicem pertineat justum proferre judicium, oportebit eum diligenter examinare si dicta juratorum in se veritatem contineant, et si eorum justum sit judicium, vel fatum; ne si contingat judicem eorum dicta sequi, et eorum judicium, ita falsum faciat judicium, et fatum.*" *Bract. lib. iv. ch. 19.*

[p] In his treatise *De laudibus legum Angliæ*.

[q] We find frequent mention of the attaint in the ancient law of Scotland. See *Reg. Maj.*

EXTENTA MANERII,

4 Edw. I. A. D. 1276.

THIS Statute hath not been taken notice of by any of our Historians, though it seems to have been made with the same view that the Domesday Survey was carried into execution, in the reign of William the First. It is most certainly no act of parliament in any sense of the word, but is merely instructions to the *Extender* [r] of the crown with regard to what he shall inquire into, and upon what heads and particulars he is to make his report. The crown had two things chiefly in view, the taxation of the subject, and the power or force to resist such a taxation: the first instruction is therefore, "*Inquirendum est de castris, et aliis edificiis fossatis circumdatis.*" The articles of enquiry which follow after this, relate to most minute particulars with regard to every man's estate upon the same plan as the Survey of Domesday [s]: "*De pannagio, et herbagio, melle, oleribus, et omnibus aliis exitibus vivariorum, mariscorum, morarum, bruerarum, turbariorum, et vassorum, quantum valeant per annum.*" This statute, made with the views I have before suggested, was followed, in two years, by the oppressive statute of *quo warranto*. The occasion of both probably took its rise from Edward's want of treasure to carry on the wars which he now meditated against Lewellin prince of North-Wales. It may perhaps be imagined, that such wars did not require great subsidies, or taxes; but it was not merely the common expences of the pay, or subsisting an army, which exhausted the royal coffers. Edward not only conquered, but was determined to keep possession of his conquests. I shall have occasion to

[r] Du Fresne says, the *Extensor* is the same with the *Æstimator Publicus*. Thus likewise Bracton, "Officium extensorum est in rebus hereditariis extendendis, et in summa omnia quæ veniunt de corpore manerii, et e quibus commodum evenire posset."

[s] This law was never carried into execution, otherwise the complaints occasioned by it must have appeared in the Chronicles.

observe upon the statute of Rutland, made in the tenth year of his reign, that he was above a year in North-Wales without ever leaving it; and during that residence in the country probably compleated the castles of Carnarvon, Beaumaris, and Conway, which shew, by the extent and grandeur of their venerable ruins, that the expence of such fortifications would alarm in an estimate from a modern Board of Ordnance, and that too in a year wherein twelve millions had been expended [1].

This statute of instructions to the *Extender*, is followed by another of the same kind to the coroner. This officer is, in the Scotch law, termed the *crowner*, in the manner that the common people now pronounce the word. Both *coroner* and *crowner* most evidently are so called from this officer's having consuance only *de placitis coronam tangentibus*: with this most obvious etymology, it may not perhaps be deemed arrogant to differ even from the great Lord Bacon, who derives it a *corona populi*; the crowd attending in a circle is by no means peculiar to this particular magistrate. Almost every one of the directions to this officer relates to the view of the dead body and the prosecution of the murderer; and most of them are now put in execution, particularly with regard to the very minute description of the wound, which hath undoubtedly occasioned the now-settled form of one part of the indictment for murder: *Item de omnibus plagis videndum est, quæ sit longitudo, latitudo, et profunditas, et quibus armis vulneratus sit læsus, et in qua parte corporis.*

[1] Giraldus Cambrensis, in his *Topographia Hibernie*, mentions, that, in the time of Henry the Second, there was but one church in Ireland built of stone; I should therefore think, that Edward the First must have planned these magnificent castles from some which he had seen in his expedition to the Holy land. England at that time had not furnished any such models, nor is it believed any country in Europe. The army of the crusades was infinitely numerous, and must have been occasionally employed in building fortifications.

THE STATUTE OF BIGAMY,

4 Edw. I. A. D. 1276.

THE title of this statute is singular, as the greatest part (of which it consists) hath no kind of relation to it. The fifth chapter takes away the benefit of clergy from him who is a bigamist, or who hath married two wives successively (not a polygamist, as the word Bigamist is generally understood), which offence no statute hath made penal till the statute of James the First. A canon of Pope Gregory the Tenth had taken away the benefit of clergy from a bigamist; which having been adopted in England, the clergy had a doubt, whether a person in holy orders, who had been guilty of this offence before the canon took place, might claim the indulgence of the common law; this statute, therefore, retrospectively declares, he shall not be intitled to such privilege. Prynne [u] takes notice of two mistakes made by Sir Edward Coke [w]. The first relates to the name of the pope, who made the canon; and the second to the preamble, which is misrecited. The pope who summoned the council at Lyons was Gregory the Tenth, and not Boniface the Eighth, who was not elected till the twenty-eighth of Edward the First, and consequently not till four and twenty years after this statute was enacted. If it is said, that this mistake of Sir Edward Coke is not of any very material consequence; the answer is, that, his Institutes and Reports being the best law-chart, and implicitly trusted to, it is proper to take notice of every shoal and rock misplaced, though perhaps not in the common track of navigation.

[u] Records, vol. iii, p. 151.

[w] 2d Institut.

STATUTUM GLOUCESTRIÆ.

6 Edw. I. A. D. 1278.

THIS parliament was held at Gloucester, and, as the preamble of the statute informs us, in the month of August; I should think, from that circumstance, rather in the return [*] of Edward from Wales, than, as Carte [y] supposes, in his march thither. The chief purpose for which the king assembled this parliament, was to oblige those who claimed any franchises or liberties to shew their title to them before the king's justices, or otherwise to seize them into the king's hands. Mr. Cay hath therefore very properly printed the statute of *quo warranto* (as it is generally called) at the end of this statute, instead of making it an act of the thirtieth year of Edward the First, as it had been erroneously

[*] This conjecture seems to be confirmed by the present statute's consisting of fifteen chapters, or so many distinct laws; for which there would have hardly been leisure whilst Edward was on his march against the enemy.

[y] In this early part of the English history, I should always prefer the authority of Carte to any other historian: he was indefatigable himself in his researches, having dedicated his whole life to them, and was assisted, in what relates to Wales, by the labours of Mr. Lewis Morris of Penbryn, in Cardiganshire: as for his political prejudices, they cannot be supposed to have had any bias in what relates to a transaction 500 years ago, and which hath nothing to do with the royal touch for the cure of the king's evil. I should here make an apology for introducing what hath no relation to the present statute; but I cannot help mentioning what I once heard from an old man who was witness in a cause, with regard to this supposed miraculous power of healing. He had, by his evidence, fixed the time of a fact by Queen Ann's having been at Oxford, and touched him, whilst a child, for the cure of the evil; when he had finished his evidence, I had an opportunity of asking him whether he was really cured? Upon which he answered with a significant smile, that he believed himself to have never had a complaint that deserved to be considered as the evil; but that his parents were poor, and had no objection to the bit of gold. It seems to me, that this piece of gold, which was given to those who were touched, accounts for the great resort upon this occasion, and the supposed afterwards miraculous cures. Gemelli (the famous traveller) also gives an account of 1600 persons offering themselves to be cured of the evil to Lewis the Fourteenth on Easter-Sunday, in the year 1686. Gemelli was himself present at this ceremony, and says the words used were, *Le Roy te touche, Dieu te guerisse*. Every Frenchman received 15 sous, and every foreigner 30, after being touched: to some of the supposed patients the king said, *Are you sick too?*

printed

OBSERVATIONS &c.

printed in the preceding editions. We find that this law was most reasonably thought to be oppressive when carried into execution; the Annals of Waverley give this account of it: "In hoc anno exijt edictum a curia regis ad universos committatus totius Angliæ, per breve quod vocatur *ab incolis quo warranto*, ad certos justitios directum, ad inquirendum de libertatibus quibuscunque quomodo a domino rege tenebantur; cujus brevis occasione omnes archiepiscopi, episcopi, abbates, priores, comites, barones, et cæteri libere tenentes, *varijs laboribus et expensis* fuerunt prægravati, et etiam rex ne parum quidem emolumenti inde affectus est [x]." Which is indeed (I had almost said providentially) the necessary consequence of a tyrannical law. Besides what I have here transcribed from the Annals of Waverley, Falle, in his account of Jersey, mentions some most violent proceedings under this statute, during the reign of Edward the First, in that island.

I have been informed, that Cardinal Fleury, at the latter end of his administration, either issued, or intended to issue, an *arret* very similar to this oppressive statute of *quo warranto*: upon the general alarm [a] occasioned by this design, the French inhabitants of those provinces, which formerly belonged to the crown of England, were furnished in several instances with evidence of their titles to franchises from our records,

This statute consists of fifteen chapters, most of which relate to the amendment of the common law as it was then practised, but which at present are not very material. From these I must except the first chapter, which relates to damages and costs [b]; the eighth chapter, which enacts, that the

[x] Gale, vol. iii. p. 235.

[a] This alarm probably occasioned the publication of the *Rolls Gascones* by Carte, in the year 1743. This valuable collection of the titles of all the records in England (which relate to the French provinces, formerly under the English dominion, and chiefly Gascony) being calculated for the use of the French, is preceded by a French Preface. The titles only of these records make two folio volumes; it would certainly however be a work deserving the encouragement of both nations, and of all learned men throughout Europe, to print these records at length: the same may be said with regard to the records in the Bermingham Tower at Dublin, some of which go as far back as the reign of Edward the First.

[b] Pierre de Fontaines, the oldest writer on the French law (except Beaumanoir), informs us, that, by the ancient law of France, there were no costs. Inst. Cout. p. 216.

cause of action in the king's superior courts shall exceed forty shillings [c]; and the ninth chapter, which takes away a very extraordinary doubt at the common law, whether a man killing another in his own defence, or by misadventure, should be prosecuted as a felon [d]. The 11, 12, 13, 14th chapters relate to the city of London only; which is a proof of the great influence this city had even so early in our history.

[c] The spirit of this law deserves to be much attended to at present, when the value of forty shillings is so very considerably lowered. Many dissertations have been written with regard to the comparative value of money in the different reigns of the kings of England; I shall chose to fix this by some statutes which shew either expressly or by implication this comparative value. By the statute of Westminster the First (3 Edwd. I. ch. v.) no man is to be refused bail for a larceny under 12d*. Sir Henry Spelman hath observed on this part of the statute, that, when every thing else is grown dearer, a man's life is forfeited every day for what is of less and less value: Judges and juries indeed, from commendable motives of humanity, do not weigh the price of goods stolen in *golden scales*; but is there not a great impropriety in a jury's finding on their oaths that goods produced in court (and which every one sees are perhaps of twenty times the value) are only worth 12d. ? and may not this liberty taken with their oath make them and the audience less attentive to it upon more material points ? But not to digress. There is a statute of 21 James I. ch. vi, which says, that a woman shall not loose her life for a larceny under ten shillings: this therefore shews, that, in the year 1623, the value of money was ten times less than at the time of making the statute of Westminster the first; and it might perhaps be very proper to extend it, in the year 1766, to twenty shillings. There is another statute 13 Charles II. Stat. i. (first printed by Mr. Ruffhead) which regulates the fees of the Masters in Chancery; the preamble to this act recites, that these offices were as ancient as the Conquest, and that 4d. at that time was more than two shillings in the year 1661. It must be admitted, that these statutes do not entirely agree in their comparative value of money; but at the same time a medium between them may perhaps be the best direction to form a judgment upon.

[d] It is recited by the preamble to the 24 Hen. VIII. ch. v. to have been doubtful by the common law, whether a forfeiture of goods and chattles was not incurred by the killing of a thief or murderer.

* There is an ancient law to the like effect in Scotland "It is statute, that no man shall be hanged for a less fault than twa (sheep, whereof ilka one is worth 16 pennies." The law of Burdinfleck. Reg. Ma). translation by Skene, 16d. Scots is at present only 1 penny farthing and a fraction.

† The title of this statute is, *An act concerning women convicted of small felonies, who, by the common law (it cannot be said to its humanity), were excluded from the benefit of clergy.*

A STA-

A STATUTE 30 DIE OCTOBRIS,

7 Edw. I. A. D. 1279.

To all Parliaments and Treaties every one shall come without force of arms.

THIS and the following law with regard to Mortmain are the only statutes of the year 1279. The first of these recites *sundry debates between the King and certain Great Men*; history is entirely silent with regard to the cause of these debates, or indeed that there were any disputes at this time between the king and his barons. There seems to be little doubt, however, that the statute, entitled *Extenta Manerii*, made three years before (which was another Domesday Survey); and the statute of *Quo warranto*, made the preceding year, might occasion these troubles, especially as the first article of the *Extenta Manerii* relates to fortified castles, and which probably might (at least in part) have been carried into execution. That the points contested were of consequence, may be inferred from the tumultuary proceeding, which this statute forbids, when there should be any further treaty, or meeting between the king and his barons.

Both this and the following statute are directed to the Justices of the King's Bench, to be inrolled and proclaimed in their courts: and as the first relates to dangerous riots, there was a peculiar propriety in transmitting it to the court of King's Bench, as being the court of the highest criminal jurisdiction in this country. The first of these laws is in French; the second, making some new provisions with regard to disposing of lands in Mortmain, is in Latin, agreeable to an observation which I have before made, that when the interest of the clergy is concerned, the statute is generally in the Latin language.

Bishop Kennet, in his Glossary, at the end of his Parochial Antiquities (*varba RELIGIOSI*) observes, that, before any statute

statute of Mortmain, the nation was so sensible of the inconvenience [arising from it, that it was often made an express condition in grants and conveyances, "*Tenendum sibi et hæredibus suis, vel cuicumque vendere, dare, vel assignare voluerint, exceptis viris religiosis, et Judæis.*" Baker [e], in his Chronicle, informs us, that the number of monasteries built in the reign of Henry the First was so great, that almost all the labourers of the country became bricklayers and carpenters. We have already found, that this growing [f] abuse was endeavoured to have been prevented by an article of Magna Charta; but, that provision having been evaded, the present statute says, that it shall not be done *quacunque arte vel ingenio.*

The opposition to Mortmain at this time arose from very different reasons, than those which have occasioned the later statutes against it: as the land was given to God, the king and the barons lost all the usual profits of lands held under them; they had no notion of an inconvenience or mischief to the public from a stagnation of property: it is this inconvenience which hath chiefly occasioned the last most effectual statute against lands being given in Mortmain. As for the testator's disposing of his effects, in prejudice to his relations, that is still left open as to personal estate, from which a benefaction of this kind is much more likely to arise, than from a gift of lands; as men possessed of landed estates have generally so much pride, that they will leave it to any one who can keep up their name or family, which a religious house or college can never do. A law, however, might be so framed, as to encourage and promote the circulation of landed property by benefactions to Mortmain purposes, as if the bequest of lands

[e] Baker is by no means so contemptible a writer as he is generally supposed to be; it is believed, that the ridicule on this Chronicle arises from its being part of the furniture of Sir Roger de Coverley's Hall. Spectator.

[f] Dugdale, in his Monasticon, makes Roger de Morteymer exclaim strongly against this practice, vol. ii. p. 218, "*Veuz beals seigneurs, comment mon pere me disheritat, a qui per zuts raisons dust aver vouch-safe tut son heritage, sans demembrer ces champs. Mes il a done a ceuz Pylains del Abbey.*" These words of Sir Roger de Morteymer are taken from an account of the priory of Wigmore in Herefordshire, in the time of King Stephen.

A STATUTE 30 DIE OCTOBRIIS 79

was made void, unless the estate was sold within a year after the devise took effect [g].

[g] It appears by one of Pliny's letters, that no one could leave any thing to the republick; Pliny however, who by this means became residuary legatee, waved the benefit of the law (which he might have insisted upon), in terms that do him too much honour not to be here inserted: "Mihi autem defuncti voluntas" (verecor quam in partem jurisconsulti quod sum dicturus accipiant) antiquior "jure est, utique in eo quod ad communem patriam voluit pervenire." Pliny, lib. v. ep. 7. It may be inferred from this, that if Pliny had been an Englishman, he would have highly venerated the memory of Sir Joseph Jekyll, for his legacy to the *faking fund*.

A NEW

A [b] NEW STATUTE OF THE EXCHEQUER,
CALLED THE STATUTE OF RUTLAND,

Made 24 Maii, Anno 10 Edw. I. A. D. 1282.

I SHOULD not have made any observations upon this statute, which contains regulations that concern few except the officers of the *Receipt* of the *Exchequer*, was it not to introduce the remark of Prynne on some mistakes of Lord Coke, and others; I shall refer the reader to p. 55, 56, and 57, of his *Animadversions* on Lord Coke's 4th Institute, as they contain many curious particulars not only with regard to the present statute, but with relation to Edward's expedition against Wales; especially as they are inserted, like many other things in this laborious compiler, where they cannot be easily found. This indefatigable antiquary hath proved beyond all doubt, that no parliament was held either at Rutland in England, or Rhydland in Flintshire, in this year of Edward the First. With regard to *Rutland* in England, I cannot find any *town* with such a name: as for Rhydland in Flintshire, Edward the First built a very considerable castle there; but Prynne hath shewn, that though this king was in North-Wales, yet all patents signed by him bear date from other places during the year 1282.

[b] It is called, *A New Statute*, being after the *Statutum de districtione Scaccarii*, already commented upon.

STATU-

STATUTUM DE MERCATORIBUS,

THE STATUTE OF ACTON BURNEL,

Made Anno 11 Edw. I. A. D. 1283.

THIS ordinance bears date at *Acton Burnel* [1], in Shropshire, the 12th day of October in the 11th year of this king's reign; this parliament must therefore have been held in Edward's return from Wales; and the attendance could not have been very numerous, as it is believed that *Acton Burnel* was never even a market town [2]. I should imagine that Edward's inducement to hold a parliament in so insignificant a place [3], arose from its lying on the borders of Wales, where he probably planned that chain of castles in the western part of Shropshire, the ruins of some of which remain to this day.

This law is entitled, *νὰτ' ἔξοχ'ν, Statutum de Mercatoribus*, and taken together with the provisions made, by *Magna Charta*, in the favour of merchants who are aliens, does particular honour to the humanity and wisdom of our ancestors. How different are the policy and laws of the French for example, who suppose that they are patterns to the rest of Europe for the civil reception, and indulgences granted to foreigners! An alien indeed cannot in this country purchase

[1] There are, in *Spelman's Index Vitaris*, no less than eighteen towns, or villages, with the name of *Acton*, which is not extraordinary, as it signifies no more than *Oak Town*: *Acton Burnel* is in *Condover Hundred*, and was so called probably from the family of *Burnel*, which, *Camden* informs us, is one of the most ancient in *Shropshire*.

[2] *Whitelock* cites a manuscript of *Sir Roger Owen's* (who was his particular friend, and a great antiquary), in which he asserts, that the house of lords sat at this parliament at *Acton Burnel*, and the house of commons at *Shrewsbury*. *Gentiny. Parl. Writ.* vol. i. p. 208.

[3] The end of the building in which this parliament was held is now said to form part of a barn. There is, in the town of *Machynllaeth* in *Montgomeryshire*, a large house, in which, by tradition, *Owen Glendower* is said to have held a parliament, by which must be meant a conference in the sense I have before contended for. The building (as far as I can trust my memory) is sixty feet in length, thirty in breadth, and about twenty-four feet high: three or four poor families now live within the walls, and under the roof,

land, any more than in France; but he knows the law, and hath no occasion to make such purchase. No one can travel however [m] without considerable sums, much less can he merchandize; and yet, by the *droit d'aubaine* [n], all the personalty belonging to a stranger is forfeited, upon his death, either to the king, or his grantee; and this continues to be the law of France in the *eighteenth century*, and a law frequently put in execution.

There are two regulations [o] in this statute which deserve to be taken notice of: the first is, that, if the creditor [p] imprisons the debtor, and the debtor hath nothing to live upon during his confinement, the creditor must provide him with bread and water [q]. The second is, if the creditor is a *stranger*, the debtor is not only to pay the debt, but likewise the extraordinary expence which the *stranger* hath incurred during his stay in England to prosecute his suit, till the time that he hath execution against the debtor's goods. The humanity of this further provision in favour of an alien merchant, is somewhat tainted by the conclusion of this law, which says, that a Jew shall in no case be entitled to it [r]: this is however in some measure pardonable, from the strong prejudices which prevailed at this time throughout Europe against this unhappy people; prejudices, which are not totally eradicated at present, and which occasioned the shameful repeal of a late law, founded upon the wisest principles of commerce.

This statute was further explained, and new provisions added, by the thirteenth of Edward the First, Statute the 3d, and which bears the same title, viz. *The Statute of Merchants*.

[m] As for bills of credit, they were probably not used at this time.

[n] This is in Latin *jus alibi natorum*. Boileau, in his eighth Satire, inveighs against the barbarity of this law.

"Un aigle sur un champ pretendant droit d'aubaine,

"Ne fait point appeller un aigle a la boutine."

i. e. to answer on the eighth day after being summoned.

[o] The debtor's recognizance is ordered to be taken before the mayors of London, Bristol, or York; these were therefore undoubtedly the principal towns of the kingdom at this time for trade. York became a place of commerce, from the trade with the Northern powers, which was anciently very considerable.

[p] Selden says, with our ancestors. *Vinculis coercere rarum erat*.

[q] On the contrary, by 13 Edw. I. ch. i. the servant, who hath not accounted with his master, is to be committed in *vinculis*, and to live in gaol *de proprio*.

[r] This part of the statute is not translated in any of the editions.

STATUTUM DE MERCATORIBUS. 83

Mr. Cay hath, in this law of the thirteenth of Edward the First, very properly inserted a various reading from a manuscript in the Cotton library, which says, that the recognisance shall be taken before the Mayor of *London*, instead of the Mayor of *Appleby* in *Westmoreland*; as the session of parliament, in the thirteenth year of this king's reign, was held at Westminster immediately after Edward's return from Bury, where he had continued during the preceding Easter, Appleby could never have been thought of, unless by a parliament held in the North of England. This explanatory statute of the thirteenth of Edward the First, likewise gives us the form of the writ, upon such a recognisance having been entered into, and the debtor's not having satisfied his creditor. There is an ordinance of Francis the First, in the year 1536. very similar to this statute, which shews the more early attention to commerce in this country.

STATUTUM WALLIÆ,

12 Edw. I. A. D. 1284.

THIS statute bears date "apud Rothelanum" (what is now called Rhuydland [1] in Flintshire) "die dominica in medio quadragesimæ anno regni nostri duodecimo:" it is certainly no more than regulations made by the king in council, for the government of Wales, which the preamble informs us was now totally subdued [1]. This law deserves most particular notice, though hitherto unobserved upon either by any lawyer or historian, except Carte, who touches upon it but transiently. It not only informs us of what were some of the customs and laws in Wales at that time, but likewise, by the remedies provided, what was the law of England.

In order to make these new regulations upon the best consideration of the different laws of the two countries, Edward had, the year before, directed inquiries upon oath before certain commissioners (with the bishop of St. David's for their president) whose certificates and returns are printed in the Appendix to Howel Dda's laws, and which contain many curious particulars [u]. Of these laws and customs, which prevailed in Wales before Edward's conquests, some are still retained, others altered, and some entirely abolished, by this statute: I shall here take notice of but two or three of them.

All

[1] There is a manuscript of this law in the Hengweit Collection. See Lhwyt's Arch.

[1] Though the total conquest of Wales is here recited, I should doubt whether it extended to any other counties than those which are mentioned, viz. Merioneth, Carnarvon, Anglesey, and Flintshire; as likewise the counties of Carmarthen and Cardigan in South-Wales. Edward had only built his castles in these counties, viz. Rhuydland, Conway, Beaumaris, Carnarvon, Harlech, and Aberystwith; all of which we know, either from history or records, were royal works of this reign, except Harlech, which seems to speak for itself to have been planned by Edward. Without such castles, it was impossible to keep an entire or permanent dominion over such a country as Wales.

[u] I shall here insert some of the interrogatories upon which the commissioners were to examine; as for the answers, see the above-mentioned Appendix.

Interro-

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All the witnesses agree [*w*], that the princes of Wales could alter the laws at their pleasure, nor do they make the least mention of a parliament, or even a council: the inference from this seems to be, that the inhabitants of this island have adopted the institution of parliaments, from some of the invading strangers. The next observation I shall make upon the examination of these witnesses is, that there is not the least allusion to any sort of feudal tenure, which confirms what I have before advanced, that they were unknown in this country before the Norman conquest. There is at present in North-Wales (and it is believed likewise in South-Wales) no copyhold tenures, and scarcely an instance of what are called manerial rights; but the property is entirely free and allodial. We find likewise, that gavelkind prevailed throughout Wales; the right of succession to lands in the eldest son must have therefore been derived also from the Normans [*x*]; as was also

*Interrogaciones de Certificacione vel Aprisa facienda secundum formam prædictarum
Literarum.*

- " Primo, Inquiratur si vidit aliquis placitum moveri inter principem Wallie et
" barones Walenses Wallie.
- " Secundo, Inter quem principem et quos barones, vel quem baronem, et coram
" quibus iudicibus.
- " Quinto, Si vidit placitum inter minorem vel inferiorem et parem suum vel pa-
" res suos.
- " Septimo, Si vidit placitum, per quas leges et per quas consuetudines in placito
" fuit processum.
- " Undecimo, Si iudicatum fuerit secundum legem Howel Dda, que vocatur
" Kerverick *, et quoties vidit iudicatum, et coram quibus, et ubi.
- " Duodecimo, In quibus casibus consuevit secundum legem illam iudicari, et
" utrum in mobilibus vel immobilibus, vel in utroque."

[*w*] One hundred and seventy-two were examined at the four different places, where these commissions were executed.

[*x*] I find by some old French verses of Guillaume Guiart D'Orleans *, that in the year 1263, at the latter end of the reign of Henry III. this point was considered by the English parliament, and that the estate was at that time equally divided in France.

" L'an se dit faux, ne sui noifans,
" Mil deux cens soixante trois ans,
" Sans plus, d'incarnation quierre;

* I have been referred by a learned and ingenious friend, since the former edition of these observations, to the catalogue of Welsh manuscripts published by Lhuyd, in that most comprehensive and elaborate work his *Archæologia*. Amongst these manuscripts, there is one entitled *Kyverick Hysal*, which he renders *leges Hoeliana*. The witnesses examined therefore with regard to the *Kyverick* (or *Kerverick*, as it is sometimes written), are examined with regard to Howel Dda's laws called *Kyverick*, or *The Laws*, κατὰ τὸν *Kyverick*.

* These verses are cited by Borral from a manuscript, under the article *Ygaument*, in his learned Glossary, which is printed at the end of *Ménage's Dictionnaire Etymologique*. Paris 1750. " F3

also the trial by battle, which was likewise unknown in Wales.

The preamble to the statute recites, that Wales was, before the conquest of Edward, *jure feudali subjecta* to the crown of England, which expression is very remarkable, as it is believed no instance can be found in any record, or ancient historian, of a *jus feudale* prevailing in England: we hear indeed of the word *feudum*; and the distinction between the *feudum novum* and the *feudum antiquum*; but a regular system of feudal law (which this expression seems to suppose) there are but very slight traces of [y]. Edward however was

“ Fit venir le Roi d'Angleterre,
 “ Des fiez qui luy appartindrent,
 “ Tous les Barons que terres tindrent;
 “ Lesquels ensemble a Parlement,
 “ Il pria de bonnairement,
 “ Que communement s'accordassent,
 “ A ce qu'une coustume ostassent,
 “ Qu'en est de tres longue tenue;
 “ Par son Royaume maintenus,
 “ Et vous diray quel, en disant,
 “ S'uns bons gentis, ou * plaisant (* paisant perhaps)
 “ Fut la mors, et enfans eust,
 “ Pleut li, on le depleust,
 “ Le statut a ce s'appertoit,
 “ Que l'aïgne le tout emportoit,
 “ Li autre rien n'en reconscissent
 “ Al assent, quel part quil voufissent.
 “ Leurs droits ierrent ainsi devisez;
 “ Li Barons du fait avifez,
 “ Quils commirent a deshoneste,
 “ Obeirent a sa requeste,
 “ Et voudrent * tant furent menez, (* oultre probably)
 “ Que les enfans d'un pere nez,
 “ S'engendrez fussent loyaument,
 “ Partissent a leur ygaument,
 “ Et selon l'ordre quils devoient,
 “ Comme cil di France faisoient.”

As I must own that I did not understand the first line of these ancient historical verses, till after a second or third reading, I shall by a translation of it possibly save the reader the same trouble; it signifies that if there is a mistake, in the date of the year, it is not very material. I must own likewise, that I do not understand the 20th line,

“ Al assent, quel part quil voufissent.”

Glanville, who is supposed to have written in the time of Henry the Second, lays it down expressly, that, if the lands were held *per militem*, the whole estate descended to the eldest son; *sin autem liber fuerit sokmanus* the estate was then equally divided. Glanville, lib. vii. ch. iii.

[y] There is likewise another expression borrowed from the Norman and feudal law in this preamble, viz. *qui alto et basso se submiserunt*. Though there have been of late years two or three very ingenious treatises to explain the ancient Common law by feudal principles, yet it is very clear, that neither Littleton, nor his Commentator, Lord Coke, seem to have known that such a law prevailed in any part of Europe, much less in England.

conqueror,

conqueror, and he had a right to make use of his own words in the preamble to his law.

After the preamble, very complete directions are given to the sheriff and coroner, upon whom so much depends with regard to the execution of the law; some of which I shall here insert, as they throw great light not only on the powers of these officers, but likewise are explanatory of other circumstances relative to the state of the criminal law at this time [z].

After the duty of the sheriff in the execution of his office is explained, the statute then proceeds in the same manner with regard to the coroner [a]; in which he is directed (amongst other particulars) to attend upon information, that a man is so dangerously wounded that his life is despaired of, and he is likewise ordered to summon a jury. This branch of duty in a coroner is now totally neglected, as his proceedings are only *super visum corporis*; it is a regulation however which deserves much to be revived; and I should conceive, that this attendance of the coroner and a jury, when a dangerous

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- [y] "Vicecomes per sacramentum duodecim libere tenentium de discretioribus et legalioribus, vel plurium pro discretione vicecomitis, diligenter inquirat de capitulis coronam domini regis tangentibus subscriptis.
- "De macerariis, carnes furatas scienter vendentibus et ementibus.
- "De whittanwariis, scilicet qui coria bovina et equina furata scienter albificant, ut sic non agnoscantur.
- "De reddobatoribus pannorum furatorum eos in novam formam redigentibus, et veterem mutantibus, ut de mantello tunicam vel supertunicam facientibus, et similia.
- "De hiis qui contra adventum et iter justiciarum se subtraxerunt, et post iter justiciarum redierunt.
- "De raptoribus virginum sanctimonialium, et matronarum honeste viventium.
- "De usurariis.
- "De hospitantibus ignotos ultra duas noctes.
- "De sanguine effuso.
- "De huthesio levato.
- "De tondentibus multones noctanter in ovilibus, et eos excoriantibus, vel etiam alia animalia.
- "De capientibus et colligentibus noctanter blada in autumpno, et ea asportantibus; et de omnibus aliis hujusmodi malefactoribus."

[a] The two statutes of Exeter, made in the fourteenth year of this king, relate almost entirely to the office of coroner, though they are not taken notice of by any writer on the law, and probably because the French is very corrupt, and hath never been translated. I should imagine, these laws were made to restrain the rapine and violences of the people, called *Gubbins*, who lived on *Dartmore*, being the marches between Devonshire and Cornwall, and who continued to be lawless in the time of Queen Elizabeth. See Carew's Cornwall.

wound had been received, was to prevent the dying words of the person murdered from being evidence. This kind of evidence as allowed at present cannot be too cautiously admitted: it is presumed indeed, that the words of a dying man cannot but be true, considering the situation under which he gives the information. But may not a dying man (though a good Christian) deprived of expected happiness in life by a wound received perhaps from an enemy, rather wish his punishment more eagerly than he should do? and may not those about the dying person (who are generally relations) repeat what he hath said more strongly on the trial than possibly the words were delivered?

After this, the duty of the coroner in cases of *abjuration* is explained, which is now indeed abolished; it may not however be improper to mention the particulars of this punishment, as described by the statute. If a felon or murderer fly to a sanctuary after the offence is committed, the coroner is to send to the king's bailiff of the commote [b], who is to summon a jury of the neighbourhood [c]. The felon is then to make his abjuration in the presence of the jury, after which he is to be led to the porch of the sanctuary, and the coroner is to appoint a port, from which he is to embark for banishment; to which port he is to proceed by the nearest highway without ever turning to right or left, and to carry a torch in his hand till he arrives.

After what relates to the sheriff and coroner, the statute then gives the form of writs in those Actions which were at that time most commonly used. The form of these writs was anciently thought to be of such consequence, that it was one of the articles insisted upon by the barons in the year 1258, that the chancellor should not only be elective, but should

[b] A commote in Wales signifies a portion of land equal to the fourth part of a cantred; *unius commoti solum, i. e. quartæ partis cantredi*. Girald. Cambr. ch. ii. "Habet autem hæc insula (Mona) trecentas quadraginta villas, et pro tribus cantredis reputatur." The word *cantred* is compounded of *cant*, which signifies a hundred; and *tre*, a town.

[c] The common reason for a jury's coming from the neighbourhood, viz. *quod vicini vicinorum facta præsumunt scire*, does not seem to be satisfactory; neighbours indeed know the facts; but they often know too much, and with too strong prejudices: the reason given afterwards in this statute seems better founded, *ne patria laboribus et expensis fatigetur*.

take an oath, *Que il ne enselera nul brief, per brief de curi, sans le commandement le roi, et le cunseel* [d].

It is likewise well known, that there is no legal argument which hath such force in our courts of law, as those which are drawn from the words of ancient writs; and that the *Registrum Brevium* is therefore looked upon to be the very foundation of the common law [e]. I have compared the writ of *Novel Disseisin*, as set forth in this statute, and likewise the writ of *Mortdancer*, with the forms in the register, which seem to tally exactly (*mutatis mutandis*) for England and Wales. I have likewise compared them with the forms in that ancient book in the Scotch law, entitled, *Quoniam Attachiamenta*: the comparison of these writs seems most fully to prove the great authority which is due to our *Registrum Brevium*, and likewise that the law of Scotland (as hath before been contended) agreed anciently not only with the principles of the law of England, but in its practice, though there might be some variances of no great importance.

[d] Gale, vol. i.

[e] All original writs must be found in the register, nor can be supplied but by the statute of Westminster the second, which gives the writ *in consimili casu*. Said by Sir Joseph Jekyll in colonel Pitt's case. *Cunyngh. Rep.* p. 25. Sir Edward Coke supposes, in the introduction to the 10th part of his Reports, that *the Register of Writs* is the most ancient book in the English law.

STATUTA REGIS EDWARDI,

Edita apud Westmon' in Parlamento suo, Pasch. anno Regni
sui tertio decimo, A. D. 1285.

THIS collection of laws, which is divided into fifty different chapters, contains matter of so miscellaneous a nature, that it is impossible to reduce the observations to be made upon it into any sort of connexion any more than the Comment upon Magna Charta. Most of these chapters were made with an intent to amend the law as it was then understood and practised, and more particularly, as the preamble informs us, to explain some parts of the statute of Gloucester, which passed in the sixth year of this king's reign. I should imagine, that it is from this collection of laws (generally called Westminster the second) that Lord Coke, in the Introduction to one of his *Commentaries* [f], hath styled Edward the First, *the English Justinian*.

The first chapter secures the estate given to a man, and the heirs of his body (called an Estate tail), to his issue; and in case he hath no issue of his body, then to the donor or his heirs; the statute very properly says, that the first taker's alienating, is *contra formam doni*, and it being so, such alienation should have been void at common law, as, if the law permits the limitation, the intention of him who creates the estate should always not only be attended to, but carried into execution; otherwise, why is any one allowed to dispose of his estate, and express his intention, by a deed solemnly executed in the presence of witnesses?

[f] I call the different parts of Lord Coke's Reports his *Commentaries*, as this is the name which he generally distinguishes them by himself. I should perhaps make an apology for having cited this great lawyer, under the title of *Lord Coke* but it is the name of pre-eminence which he hath obtained in Westminster-Hall: the late publication of the Journals of the House of Commons shews, that he did not prostitute his amazing knowledge of the municipal law to political purposes, as he generally argues in the same manner and from the same authorities which he cites in his Institutes.

This chapter of Westminster the second is generally supposed to have introduced *Estates tail*, but it should more properly be said to have established them: Selden thinks he hath found traces of this kind of estate, in the laws of Alfred, “ Qui terram habuerit per scripturæ seriem (sc. *Boçland*) sibi a majoribus relictam, ab hæredibus ad alios alienandi potestas non esto, siquidem præsentibus cognatis coram rege, aut episcopo, scriptura aut testimonio probetur, omni alienatione interdixisse ei illum, qui prius concessit, talemque ei imposuisse legem cum primo dederit [g]. En, jurisperiti, feudum quod dicitis *talliatum*, Edwardi Primi decimo supra tertium anno hic multo antiquius habetis [b].” Though what Struvius says, in his *Jurisprudentia Feudalis*, “ Quod apud Anglos præcipue obtinet,” may be true, yet it is more or less used in most of the countries of Europe, under the names of *Maggiorati* and *Majorats*, and seems likewise to have been universally condemned wherever it hath been introduced. *Giannone* (who derives the *Maggiorati* used in the Neapolitan territories, from the Norman and feudal law, and not from that of the Lombards, in which there is no trace of any such estate) speaks thus of them: “ Nel secolo decimo sesto i maggiorati, e le primogeniture (quasi che incognite agli antichi) si resero così frequenti, che la loro materia diffusa empi la Giurisprudenza di nuovi termini, di nuove dispute, e nuovi trattati [i].” The same inconveniences could not fail of being soon experienced in England; for Chaucer, in his character of the *Man of Law*, says,

“ *All was fee simple to him in effect:*”

Besides the intricacy and perplexities in the law; besides the stagnation of landed property, so contrary to the promotion of industry [i], these estates have been productive of perpetual disagreements between the father and his eldest son, which indeed he well deserves from his most unnatural treatment of his younger children, though from custom the hard-

[g] Ll. Alfr. et Edg. ch. xxxvii.

[b] Seld. vol. ii. p. 926.

[i] Gian. vol. iv. p. 294.

[k] See Lord Bacon's use of the law, where he dwells much on the inconvenience of entails.

ship does not perhaps strike him, when he makes his marriage-settlement. Younger children in this country are not indeed exposed as they were amongst the Greeks and Romans, and as they are to this day in China; but the very scanty provision made for them, in comparison with the eldest son, seems to approach nearly to this barbarity.

This unequal distribution of the father's estate was unknown anciently [1] in any nation, whether civilized or barbarous; nor do we hear of it at present in any part of the world, but in certain states of Europe. It can as little be said, that we derived this custom from our ancestors the Germans; for Tacitus, in his treatise *De moribus Germanorum*, informs us, that *successores sui cuique liberi*; and this equality of distribution, even at this day, generally takes place in personal property, which being of a more fluctuating nature, pride does not interfere with the natural and equitable distribution of [m].

The perpetuities established by this statute in process of time had so much contributed to the increase of power in the Great Barons, that about two centuries afterwards, it was in a great measure evaded, by the invention of what is called a common recovery: it was impossible for the crown to procure a repeal of the law in the house of lords, and therefore the judges had probably an intimation, that they must by *astutia*, as it is called, render a statute of no effect, which the king could not extort an alteration of, from one part of the legislature [n].

[1]

τοὶ δὲ ζῶντες ἐδάσαντο

Παῖδες ὑπέρβουμοι, ἢ ἐπὶ κλήρας ἐβάλλοντο. Odyss. l. xiv. v. 208.
So Petyt, in his *Leges Atticæ*, ἀπάντας τὰς γνησίας γὰρ ἰσομοίρους εἶναι.
p. 51.

[m] Mr. Hakewill, in one of the Dissertations, published by Hearne, gives this very extraordinary reason for the whole estate being limited to the eldest son, viz. that in the northern countries population goes on so fast, that the estate would otherwise be frittered to nothing.

[n] Boulainvilliers informs us, that the French nobility had the public spirit, in the year 1560, to oppose limitations beyond three lives. I call it publick spirit, because entails are chiefly calculated for the pride of great families, and hence this statute of Westminster the second hath been called the *Statute of Great Men*.

The great benefit arising from this method of cutting off an entail, seems to have made us shut our eyes on two very glaring improprieties in this fiction of a common recovery. The first is, that it is directly in opposition to the express and clear words of a subsisting law; and let the inconveniences of a statute be what they may, no judge, or bench of judges, can constitutionally dispense with them; their office is *jus dicere*, not *jus dare*. As then the mischiefs arising from this chapter of Westminster the second are universally seen and acknowledged, why should it not be repealed by (that power which can only repeal it) the legislature [o]? I never heard but of one objection to this, which is, that certain officers and patentees would lose the fees which they are entitled to upon common recoveries. If there are such claimants, who would be injured by the alteration, it is but just that they should have a reasonable compensation, and the repealing act need not consist of many words; it is only necessary to say, that every tenant in tail *shall, to all intents and purposes, be considered as a tenant in fee simple*, which he is indeed at present, with this only difference, that a tenant in tail can dispose of his land by one method of conveyance (that of a common recovery), and a tenant in fee simple may choose out of many different modes of conveyance.

The other impropriety in the common recovery is the very ridiculous and absurd fiction by which the statute is evaded. There have formerly been many questions arising upon mistakes in suffering recoveries, which as often as they have been argued, it hath been attempted with great ingenuity to decide upon principles: but how can such a fiction be supported, or any thing relative to it, upon solid ground or argument? Most

[o] I am aware that some statutes necessarily suppose recoveries to be legal, but this is not the regular and proper method of repealing a subsisting law. Bishop Burnet, in his history somewhere mentions a statute of Charles the Second, with regard to the drawing of horses a-breast on the highways, which was so impracticable, that the Judges on their circuits directed the grand juries not to put it in execution: this seems to have been assuming a very extraordinary liberty with an act of parliament, and that so recent one. I cannot help here taking notice of what seems to be a very great impropriety (permitted every day in the courts of law), viz. the treating statutes, and particularly *modern ones*, as being ill penned, and not having been properly considered: they are the acts of the legislature of this country, and therefore this ridicule eternally thrown upon them is surely not inculcating a reverence to the laws.

men of fortune and rank in this country never enter a court of justice, but to go through this most ridiculous ceremony : can the serjeants who mutter certain jargon, or the judges who preside, explain to such a person what is going forward ? what an impression must this leave with regard to other legal proceedings ? In this enlightened age, when other questions are decided with such strength and force of reasoning (without that refined subtilty which formerly prevailed to the disgrace of the law), it is high time that there should be an end of such unintelligible trumpery [p].

C A P. XIV.

CUM de vasto facto in hæreditate alicujus consuevit fieri breve de prohibitione vasti, per quod breve multi fuerunt in errore, credentes quod illi, qui vastum fecerunt, non habuerunt necesse respondere, nisi tantum de vasto facto post prohibitionem eis factam, dominus rex ut hujusmodi error tollatur, &c.] This chapter of the law deserves notice, as it shews that the statutes of the greatest consequence at this time were little known to the generality of the subjects. Waste had been expressly forbidden both by Magna Charta and 3 Edw. I. ch. xxi. and yet we find that these statutes either were not known, or not considered as binding ; for they expected to evade the penalties for disobedience, if they had not express notice by a writ to forbid the committing waste. It is a necessary maxim in all laws that ignorance shall not excuse ; and yet, before the use of printing, it was in many cases a hard maxim, and is even so now at present, from the multiplicity of penal statutes.

[p] It is to be wished, that the fictitious proceedings in the common action of an ejectment were altered ; no client can possibly be made to understand the reason of such a fiction : if it is answered that there is no occasion for his understanding it, I still insist that mystery should always be removed, especially when no one bad consequence can be suggested from such a removal. Fapian Phillips, in his treatise on Capias's and process of outlawry, gives this account of the introduction of the *lease and release* used by our conveyancers : " It was first contrived by Serjeant Francis Moore, at the request of the Lord Norris, to the end that some of his relations should not know what settlement he had made ;" p. 115.

CAP. XXV.

QUIA non est aliquod breve in Cancellaria, per quod querentes habent tam festinum remedium, sicut per breve nove disseisine, dominus rex volens ut celeris fiat justitia, &c.] The remedy by this, or any other writ of assise, is now seldom used, but was formerly the common remedy [q], from the greater expedition in attaining the right. Lord Coke [r] informs us, that it was called an assise of *novel disseisin*, in opposition to an *ancient disseisin*. The justices in Eyre at this time went their circuits but once in seven years, and no disseisin before the Eyre (if not complained of in the Eyre) could be questioned afterwards; and therefore a disseisin committed before the last Eyre, was called an *ancient disseisin*, whereas that committed after the last Eyre, was called a *novel disseisin*. The reason why assises were more expeditious than other remedies, arose from no essoin being allowed in them, and likewise that in an assise the jury is to appear as soon as the defendant; but in other original writs no jury is to be returned, till the parties have appeared, and are at issue. This chapter, in every part of it, speaks with proper warmth against delays in procuring justice. Thus also an ordinance of Charles the Seventh of France, in the year 1454, directs, “*Que les matieres possessoires, et de novel disseisin, seront decidees le plus brief que faire se peut; car autrement, par la longueur des plaidoiries, les proces seront quasi immortels* [s].

It appears by this chapter, that the sheriff used to take an ox both from the *disseisee* and the *disseisor*: his claim upon the *disseisee* probably arose from the restoring him to possession; the statute however very properly directs, that for the future he should only claim this fee from the *disseisor*, who was certainly the person to be punished; and it likewise enacts, that, if there are more disseisors than one named in the writ, the sheriff shall only be entitled to *one ox*, and that the value of

[q] One volume of the Year Books entitled, *Le Livre des Assises*, contains chiefly decisions upon writs of this kind. Assise is likewise one of the principal heads in Fitz-herbert and Brook's Abridgement.

[r] In his first Institute.

[s] Ord. Royales, p. 21.

the beast shall not exceed 5s. and 4d. From this a very strong argument may be drawn against the practice in many officers, who, when the names of many persons are inserted in one instrument, are but too apt to charge separate fees.

There is a right of *tronage* mentioned in this chapter, for which a *novel disseisin* will lye : as I do not recollect to have met with this right or word elsewhere, it may not be improper to mention, that Du Fresne says it is a right of toll for weighing goods (probably at a fair), and that *trona* signifies a pair of scales [1] : he likewise derives Troy-weight from this word ; how justly I will leave to etymologists.

C. A. P. XXX.

ITEM ordinatum est quod justitarii ad assisas capiendas assignati, non compellant juratores dicere precise, si sit disseisina vel non ; dummodo voluerint dicere veritatem facti, et petere auxilium justiciariorum : sed si sponte velint dicere quod disseisina sit, vel non, admittatur eorum veredictum sub suo periculo. The latter part of this chapter shews, that the contest between judges and juries was of a very different nature at this time, from what it hath been of late years. The reason of this arises from what I have before observed, with regard to its being very common anciently to bring attaints against juries, and an angry or dishonest judge therefore drove them to the finding an improper verdict, in order to subject them to the prosecution by attaint ; *Admittatur eorum veredictum sub suo periculo.* As this law is unrepealed, there can therefore be no doubt but a jury may find what verdict they please, and the misfortune is, that they run no risque at present of an attaint ; there is however generally that moderation in juries, that they seldom abuse this liberty.

This chapter is generally called the Statute of *Nisi Prius* ; it relates to actions depending in *utroque Banco*, without any

[1] There is at Edinburgh a church which is called the *Trone-Church*, and probably from the *trona*, or publick scales, having hung opposite to it. There is likewise in the *Rolls Gascognes*, published by Carte, a record thus entitled, "*De officio tronagii, et pesagii lunarum*," p. 269, which agrees with Du Fresne's signification of the word.

notice of the court of Exchequer; nor is there any mention in 14 Edw. III. ch. xvii. (which likewise relates to the authority of Justices of *Nisi Prius*) but only of the Chief Baron of the Exchequer, which is a further proof of what I have before observed in the Comment upon Magna Charta, that the Barons of the Exchequer were not anciently considered, as having the same office or powers with the Justices of the King's Bench and Common Pleas.

G A P. XXXIII.

QUIA multi tenentes erigunt cruces in tenementis suis, aut erigi permittunt, in prejudicium dominorum suorum, ut tenentes per privilegium templariorum et hospitalorum tueri se possint contra capitales dominos feodorum: statutum est, quod huiusmodi tenementa capitalibus dominis aut regi incurrantur, eodem modo quo statuitur alibi de tenementis alienatis ad mortuam manum.] This abuse of the Knights Templars, together with another (provided against by the 43d chapter of this law) of declining determinations in the king's courts, as also their large endowments [w] and riches, seem to have been the cause of the dissolution of this Order in the following reign [w]; and not the crimes of which they were accused. Many learned men have written in defence of them, and particularly Mariaha, Boccace, and Dupuy [x]: Stubbs likewise asserts, that they had done nothing which deserved this persecution; Voltaire says, "Que deux et un temoins les accusèrent de renier Jesus Christ (en entrant dans l'ordre) de chracher sur la croix, et d'adorer une tete doree montee sur quatre pieds, et que le novice juroit de s'abandonner a ses confreres." This agrees with the charge likewise in Dugdale's Monasticon [y], where the examinations are printed; but the proof is very defective. Their exclusive privileges were equally inconvenient in other

[w] "For wealth is crime enough to him that's poor." DENHAM.

[x] There is in Cox's History of Ireland, p. 89. an order to Sir John Wogan Lord Deputy, in the year 1367, to suppress the fraternity of Knights Templars.

[y] *Puteanus* in Latin. See likewise Mariana's Hist. de Espan. vol. i. p. 597. Madrid 1669.

[z] Vol. ii. p. 559.

parts of Europe, and produced the same persecution of the Order. The writers in defence of the Jesuits attribute their present troubles, in the Roman-catholick part of Europe, to the same causes.

C A P. XXXIV.

PURVEU est, que si homme ravist femme, espouse, damoiselle, ou autre femme desformes, par la ou elle ne se est assentue, ne avant, ne apres, eit judgement de vie et membre. Et ensement par la ou homme ravist femme, dame, espouse, damoiselle, ou autre femme a force (tut kel se assente apres) eit tel judgement comme avant est dit.] This is the only chapter in the old law French (and that rather more corrupt than usual) in this whole statute, which consists of fifty chapters; and what is still more singular, the latter part of this chapter is in Latin. It likewise makes a very extraordinary distinction between a rape, and a rape *by force* which at first seems unintelligible, but receives an explanation by some writers on the French law, who make a distinction between a *rapt* and a *viol*. The first of these was only a seduction of a ward, with intent to marry her, which is a misdemeanor; the *viol* on the contrary is what we understand by the word *rape*, and is punished capitally. This distinction likewise accounts for the difference of opinion amongst our writers on the criminal law, whether rape was a felony or not before this statute. The *viol* or rape was felony with us, as in France; the *rapt* (or seduction) was not [a]. By some of the ancient laws of Europe, the consent

[a] Vouglans, who is a writer of character on the criminal law of France, in his chapter on the *viol*, cites this determination from Brunau, who hath likewise written a treatise on the same subject.

“ Je l'apporte de Brunau a ce sujet un exemple memorable, qui fait assez sentir combien cette preuve est dangereuse, et equivoque (sc. de Viol), et combien le juge doit se tenir en garde contre ces fortes d'accusations. Un juge ayant condamne un particulier, qu'une femme accusoit de viol, a lui donner une certaine somme par forme de dommage et interets; il donna en meme tems a ce particulier la permission d'enlever a cette femme l'argent qu'il venoit de lui donner, ce que le jeune homme n'ayant pu faire, a cause de la resistance vigoureuse que lui opposa cette femme; le juge ordonna a cette derniere de restituer la somme, sur le fondement qu'elle auroit pu encore mieux defendre son corps, que son argent; si elle l'eut voulu.” (Vouglans, p. 498. Paris 1757, 4to. It is amazing that it should have escaped these two writers (as well as per-

haps

consent of the woman ravished, after the rape, purges the offence; by others not. By the laws of Scotland, the consent afterwards prevents the punishment of the criminal [b]; with this agrees the law of Bretagne [c]: on the contrary, by the English and many other laws, the consent afterwards does not alter the offence.

Great attention is shewed, by some of the old laws (of what are called barbarous nations), to the protection of the chastity of women: "Si qua foemina vadit in itinere inter duas villas, et obviavit cum aliquo, et per raptum denudat caput ejus, vi sol. mulctetur; si ejus vestimenta levaverit, ut usque ad genitalia denudet, vi sol. solvat; et si eam denudaverit, ut genitalia ejus appareant, vel posteriora, xii sol. solvat [d]." In the warm climates of Spain and Italy lesser injuries, or even the approach to a woman is made penal. There is a law of the Wisigoths (whilst in Spain) "ne, absentibus propinquis, mulierem medicus phlebotomare praesumat [e]." By a law of Naples, in 1571, this is still carried further, and it is made a capital crime in those, "che per forza baciassero le donne, anche per sotto pretesto di matrimonio [f]."

It hath always been required in most countries, that the complaint for this offence should be made within a certain time. Thus, by the laws of Navarre: "*Las mocas y doncellas desfloradas non puedan pedir su virginidad o estrupo, sino dentro de quatro meses despues que fueren dasfloradas, o que a solo su dicho dellas non se de fe ninguna ni credito [g].*" By the Sicilian Constitution, the complaint should be made in eight days: by our law no particular time is fixed for the complaint of this injury; but, if not recently made, it always

haps the French courts of justice), that this case is in circumstances and terms precisely one of Sanchó's most famous decisions whilst governor of his island.

[b] Eriks. Inst. p. 482.

[c] Rapé is punished with death by the laws of Bretagne, if the woman is not a public strumpet; or, though a public strumpet, if she lives with her husband; D'Argentre, 2050. Forbes, in his Institutes of the Scotch law, lays it down, that a woman may be convicted of ravishing a man, vol. ii. p. 125.

[d] Lindenbr. Leg. Alemaun. p. 378.

[e] Lindenbr. p. 203.

[f] Giannone, vol. iv. p. 2495.

[g] P. 256.

affords the strongest argument of presumption in favour of the person accused [b].

This part of the statute having made it felony in the man to commit a rape, suddenly changes from French to Latin, and enacts, "*Si uxor sponte reliquerit virum suum, et abierit, et moretur cum adultero suo, amittat in perpetuum actionem petendi dotem suam, nisi vir suus sponte et absque coercione ecclesiastica, eam reconciliet et secum cohabitare permittat.*" The occasion of this sudden change of the language, and in the middle of a chapter, probably arose from what I have before observed, that when a law relates to the interests or concerns of the clergy, it is generally in Latin. Now adultery and fornication are only offences of spiritual consufance, and never were criminal in this country either by the common or statute law, but in the time of the commonwealth, and protectorate. By two ordinances, in 1650,

Veneri Martique timendas,

it is made felony, without benefit of clergy, in both man and woman to commit adultery and fornication; the first offence is punished with imprisonment for three months, and the second with death. These statutes could not have continued long unrepealed, even if Charles the Second had not succeeded to the throne. Though adultery and fornication are made civil offences by the laws of many countries in Europe, yet I cannot find any which approaches to the severity of the ordinances of the commonwealth, except a law of Sicily, "*Si quis cum volente et acquiescente vidua stuprum commiserit, flammis ultatricibus exuretur* [i]." It should seem, that it was lawful to burn the person guilty of fornication by the Jewish law, at least Judah proposes to burn Tamar [k].

[b] There is a very singular law of the kingdom of Arragon with regard to rapes: "*Nulla puella audiatur super virginei pudoris violentia, si per unum diem et noctem tacuerit. Si probatur violentia, vir debet cum ea contrahere si sit par; et si par non fuerit, donet ei talem virum qualem habere possit ante violentiam factam.*" Fueros del Reyno de Arragon, p. 164.

[i] Const. Sic. p. 251. Panorm. 1637. Fol.

[k] Genesis, ch. xxxviii.

C A P. XLII. & XLIV.

DE marescallis domini regis, de feoda camerar', custod' hostiorum in itinere justitiorum: ordinatum est quod de qualibet assisa et jurata quam custodiunt, capiant quatuor denarios tantum, et de ebriographis nichil. De his qui vocati sunt ante justitios ad defendendum placitum suum nichil pro ingressu vel egressu capiant, ad placita coronæ de qualibet dyedena xii denarii tantum capiantur.] I have in the text taken part of the 42d chapter and part of the 44th, which both relate to fees claimed by certain officers, and between which a chapter relative to the Knights Templars is most improperly inserted. The chief reason of my making any observation upon this part of the statute arises from the words affording a strong inference, that the courts of law were not at this time *open courts* in the sense

[/], that they are now understood so to be. An open court at present is generally so crowded by idle spectators, that no one who hath any real business to do can have access; or, if he procures access, he is not so much at his ease, as those whose interests are depending have a reasonable right to insist upon. This statute therefore directs, that the plaintiff, or defendant, should pay nothing; but that the idle part of the audience should pay one penny each for admittance, which may be nearly equal to a shilling at present: so that if the spirit of the law was attended to, it would, in a great measure, prevent what is now so sensibly felt as an inconvenience. The statute then enjoins the judges, in these emphatical words: "Quod dominus rex justitiariis injungit in fide et sacramento quibus ei tenentur, quod si hujusmodi ministri contra prædictum statutum in aliquo iverint, pœnam eis infligant rationalem." When the servants of judges at the Old Baily, and the officers of the courts in Westminster-Hall, have, upon certain occasions, taken not only a penny from the spectator, but even insisted upon gold; are they not within both the letter and spirit of this law? and is it not incumbent upon

[/] In the modern sense of an *open court*, the legislature could never have allowed any fees to be taken for admittance.

the judges to put it in execution agreeable to what is enjoined by the statute?

Other parts of the law relate to the fees of the chamberlain, who was entitled to a palfrey [m] *de tenentibus per baroniam*; and, if such a tenant is an abbot or prior, the chamberlain is to be contented with his upper vestment, or rather the price of it: for, says the law, it is more decent "*quod viri religiosi finem faciant pro superiori indumento, quam exuantur.*" These little circumstances shew strongly the manners of the times.

C A P. XLVII.

PROVISUM est quod aque de Humbre, Ouse, Trente, Doon, Eyre, Derwent, Werf, Nid, Yore, Swale, Teese, et omnes alie aque in quibus salmones capiuntur in regno, ponantur in defenso quoad salmones capiendos; a die nativitatibus Beate Marie, usque ad diem Sancti Martini, et similiter quod salmoneti non capiantur, nec destruantur per retia, vel per aliqua ingenia, a medio Aprilis, usque ad nativitatem Beati Joannis Baptiste.] There are many ancient acts of parliament in the Statute-book, for the preservation of the salmon, and still more in the Scotch [n] statutes: the reason of this particular attention arose from salted fish, and especially salmon, forming great part of the winter's provision, which appears, by the accounts of stores for the religious houses, in Dugdale's Monasticon.

[m] This perquisite of a palfrey was probably claimed by the chamberlain, for introducing the *tenentes per baroniam* to do homage. *Chambellage* is a considerable head of the old French law.

[n] By one of the Black acts, it is made penal in Scotland to take any salmon for the space of three years, which must have been very difficult to enforce, as it made one of the great staple commodities of the country for exportation. There is likewise a very singular provision by an Irish statute of 11 Eliz. ch. iv. for the preservation of salmon, by which all swine, which feed on the strand where the sea ebbs and flows, are forfeited; it being supposed, by the preamble of the statute, that they feed on the spawn of fish, and particularly the spawn of salmon, and eels. By one of the laws of the ancient Wisigoths in Spain, no person is to fish for salmon, but on one side of the river, and that only to what in our laws is called the *filum aque*, and which they describe to be that half of the water, included between the bank of the river, and the greatest force of the stream. *Fuero Jusgo*, p. 591. There are likewise very minute regulations to the same purport (during the reign of St. Lewis) in France. See *Ord. Royales*, p. 1.

Not only private houses relied upon a supply of salted fish for the winter's consumption, but armies at this time could not be marched or subsisted without them; there is, in Rymer [6], an order of Edward the Second, to provide 3000 dried salmon for this very purpose. Thus likewise Monstrelet [7], mentioning the defeat of the English, and their convoy being taken, says, "*Que grande partie du charoy des dits Anglois estoient charges de harene, et a ceste cause la bataille fut appelle la bataille des harens.*"

The regulations of this statute were principally intended for the Northern rivers of England, which empty themselves into the Eastern sea, as appears by the names of those which are enumerated. It would be indeed highly absurd to fix the same time for all rivers indiscriminately, as rivers even upon the same coast, if at a considerable distance, often vary in the time of the Salmon coming up to them; and, between the Western and Southern rivers compared with the Eastern, there is the difference of months. It must be admitted however that there are general words which follow, and which include all rivers in the kingdom; but I should think that the word *all*, after the enumeration of the North Eastern rivers, would receive a limited construction, as it sometimes does; for if the Thames was meant to be included, could this parliament sitting at Westminster upon its banks, have [8] omitted the particular mention of it, and that before the other Eastern rivers?

After all, these regulations are either neglected, or, if put in force, do not seem to have any great effect: there are sometimes, for many years together, great quantities of fish, and at other times great scarcity, both the one and the other probably arising from causes, which we are totally ignorant of; and indeed we know less of the natural history of fish, than of any other kind of animals. If any new law should be thought necessary, why should not the policy of the late Game

[6] Rymer, vol. iv.

[7] In his Chronicle, vol. ii. p. 251. Paris, 1572.

[8] Upon looking into the statute of 13 Rich. II. ch. xix. which recites this chapter of Westminster the second, the Thames is mentioned before the Humber, &c. This shews the great inaccuracy in the citing or referring to statutes formerly, before the use of printing.

act be adopted? and why should it not be penal for any person to have at his table fish in the spawning season, as well as it is penal to have a partridge or pheasant in the prohibited times [x]? It cannot however be done by a general law, as I said before; and the particular times must be settled for the different rivers

This statute, from the many regulations which it contains, together with the statutes of Wynton, and the statutes of Labourers, Liveries, and Maintenance, were ordered to be proclaimed in every county by Edward the Fourth. This is mentioned in the Year Book of the first of Henry the Seventh [y]; but the Chief Justice observes, that some of the privy counsellors, who had just taken an oath to observe these laws and put them in execution (before the king in council); broke through some of them, *even in going down stairs.*

[z] There is, indeed, a statute of Queen Elizabeth to this purpose, and which every steward of a court leet is particularly enjoined to give in charge, under penalties, 1 Eliz. ch. xvii. This law, however, seems not to be known to the stewards of courts leet, or to any one else.

[1] T. Mich. p. 3.

STATU-

STATUTUM WYNTON.

13 Edw. I. A. D. 1285.

THE preamble to this statute recites [1], that when murders, burnings, robberies, and thefts were committed, the inhabitants of the county were more willing to excuse the offender, than to punish for the injury to a stranger; and that if the felon was not himself an inhabitant of the county, yet the receiver of the stolen goods frequently was so, which produced the same partiality in juries, who did not give proper satisfaction in damages to the party robbed [2]. This preamble therefore shews the particular propriety of the regulation of *hue and cry* [w] at this time, which made the whole county answerable, and therefore took away from juries the inducement to spare their countryman when indicted. It continues however an excellent regulation of police even at this day (when juries do not determine between the criminal and the publick from the same blamable prejudices), as I have before observed on the 6th chapter of Westminster the first; the provisions of the statute however have been much neglected, and Hollinshed complains, that, in the reign of Queen

[1] I have given the substance of this preamble, which is absolutely unintelligible in the common translations.

[2] We do not hear at present of damages or satisfaction for a robbery; which at this time were generally prosecuted by appeal, as the appellor was entitled to restitution of the stolen goods, when he prosecuted by appeal, but not when he prosecuted by indictment, till the statute of Henry the Eighth. This restitution is here expressed by the word *damages*; the reason of the restitution to the party when he appealed, arose from his being at the expence of the prosecution.

[w] I had supposed (in the former edition), that the word *bue* is possibly a corruption of the Norman word *barou*, as the word *bue*, from which it would be more natural to derive it, is always used in contempt when it signifies a shout; and is, besides, a repetition of the same word, as *bue* and *cry* would then signify the same thing. I find however in Joinville's Life of St. Lewis, who attended that king in the Crusade, that *huer* signifies to pursue. Thus (p. 52.) the Count de Soisson says to Joinville, "*lessons huer ceste chiennaille*;" or, *let us give over the pursuit of these poltroons*. *Hue* and *cry* therefore (from the word *huer* used in the above sense) signifies, what it really is, the *pursuit* and *cry* to apprehend the felon. *Histoire de Saint Louis*. Paris, 1761, Folio.

Elizabeth, the constable, upon notice of a robbery, did not consider it as part of his office to raise the country. We find by the preamble, that it is by no means confined to the offence of robberies, as generally understood; but extends likewise to murders, burning, and thefts, being those offences which require an immediate pursuit and punishment of the offender. Hue and cry was an old institution in many parts of France, "et plusieurs fois avons nous commandés en nos assises, que tuit saillent a cris qui avenront, et que chacun met pain en arrester les malfaiteurs susdits [x]." Mr. Milmay, in his account of the Police of France, informs us, that at this day the Lord of the seigneurie is obliged to prosecute every felon at his own expence, and which is often a very heavy one: it is believed however, that the raising the hue and cry is at present as much disused in France, as it is in England.

This law, which consists of six different chapters, relates only to regulations of Police, which is very uncommon in these capitularia, or collection of laws; those of Magna Charta, Westminster the first and second, containing very miscellaneous matter, without any kind of connection; the 4th chapter directs, that the walls of the great towns shall be shut from sun-setting to sun-rising, and that watchmen shall patrolle the streets; the 5th directs, that the highways shall be cleared of wood to the breadth of 200 feet, in order to prevent the felon's concealing himself [x]: and the 6th and last directs, that every man shall, according to his substance, have arms in his house, in order to pursue the felon effectually; and the constables are ordered to view the houses at stated times, in order to see whether the owners have provided themselves with such proper armour [z].

There are so many mistakes in the translation, or original French, of this statute, that I shall here take notice of them: in the 3d chapter, *chascun vile* is translated *every country*, but it

[x] Beaumanoir, ch. lxxvij.

[y] The word, in the original, is *taper*, which signifies to hide himself like a mole. In the Year Book of 4 Edw. IV. T. Pasch. the term of *entablis sous la terre* is applied to Humphrey de Nevil, who had thus hid himself in Northumberland after a rebellion.

[z] This is the first instance of a power given to officers to enter a house, in order to see if a parliamentary regulation is put in execution.

should

should be *every town*, as the word *vile* is translated in the following chapter. The translation of the beginning of the 4th chapter is indeed very intelligible, but it by no means follows the original, the meaning of which is obscure, and should probably be thus understood; "*Nor shall any one lodge in the suburbs of the town, if NOT in the day time, nor even in the DAY TIME, if his host will not answer for him.*" In the 5th chapter, the wood is ordered to be cleared in the highways, "*issint que cet estatut ne extende pas as keynes, ne as gros fusz :*" this is translated, shall not extend to ashes, nor to great trees. Now an ash-tree, in French, is *fresne*, and an oak is *chesne*, or *quesne*; and therefore the word *keyne*, used in the statute, most clearly signifies an *oak*, and not an *ash*; though it is admitted that an *ash*, from the thinness of the foliage, is less likely to conceal a robber than an *oak*. At the latter end of the same chapter, he who makes a park, is ordered to fix his wall "*atant quil joyt la leeste de deux cens pes pres del haut chemein.*" This word *joyt* should most clearly be *joyt*, and the translator hath entirely omitted the words *la leeste*, or *at least*. In the 6th and last chapter, the word *chapel de fer* is translated a *breast plate*, which can mean no other part of armour than a *Helmet*: Cotgrave, in his Dictionary, says, that *chapel* signifies the same with *chapeau*; and Du Fresne says, that *capellus* is synonymous with *galerus* or *pileus*.

STATUTA

STATUTA CIVITATIS LONDON [a],

Edita apud Westm' anno 13 Edwardi regis, A. D. 1285.

TH E Statute of *Circumspecte agatis*, as well as the *Statute of Merchants* (already taken notice of in what hath been said on the Statute of *Acton Burnel*), follow next in the Statute-book ; but I shall make some observation upon the present law out of its order, as it relates to Police, and was made the same session with the Statute of *Wynton*. Whether from this law's being local, or from what other reason I cannot pretend to conjecture, this statute hath never been translated, though it contains some very curious particulars. The preamble states, that there were both by night and day continual affrays in the streets of London ; it therefore directs, that no one "*soit si hardi etre truye alaunt ne batraunt* [b] "*parmi les ruyes apres cover feu* [c] ;" and that they should carry no arms of any kind, unless they were *Grant Seigneur, ou autre prodome de bone conyssaunce* ; and even if such a person was in the streets during the night he was to carry a light with him [d] ; the punishment for offending against this part of the law is, that the *Gardein de la Pes* (the Conservator of the Peace) shall send him for that night to the *Tonel*, which word

[a] London was at this time (as it hath continued since) the metropolis of this island, and without a second. Fitz-Stevens, who wrote in the reign of Henry the Second (amongst many other curious and entertaining particulars) says, that this city could then raise 20,000 horse and 60,000 foot ; and that when the citizens of other cities were styled Cives, the Londoners had the appellation of Barones : their liberties therefore make an express article of Magna Charta. Fuller, in his *English Worthies*, says, that foreigners often conceive London to be the island, and England the metropolis.

[b] I conjecture *batraunt* to signify the same with *barreterant*, or quarrelling ; the French is very corrupt, and the Glossaries give no light.

[c] We find the *cover feu* is here mentioned as a common and approved regulation ; it was used in most of the ancient monasteries and towns of the North of Europe ; and the intent was merely to prevent the accident of fires : buildings were then of wood ; and Moscow, being built of this material, generally suffers once in twenty years.

[d] There is a generally vulgar error, that it is not lawful to go about with a dark lantern : all popular errors have some foundation, and this regulation may possibly have been the occasion of it.

I cannot find in any of the Glossaries; it certainly means however the same with the *Round-house*, and was either anciently an old butt or hoghead, or something built in the shape of one. We still retain the name of *Round-house* for this temporary gaol, though sometimes they are Octagon or Hexagon buildings, as that at the end of the New Church in the Strand, and another in the Church-yard of Westminster-Abbey. As this punishment should subject the person confined to ridicule, it might not perhaps be amiss to restore the original hoghead, instead of these more elegant and modern buildings.

The next regulation is, that no tavern, in which either wine or beer is sold, should receive guests after *cover feu*. This might have been well intended by the legislature, but it probably was the occasion of greater drunkenness; as, to evade it, they were obliged to begin their debauch earlier. The penalty upon the tavern-keeper for this offence is remarkable, as the fine is increased even to the *fourth offence*; and I do not recollect any other instance of a statute going beyond the *third*.

There were however deeper causes of these affrays and tumults in the streets than the resort to taverns, as the inhabitants of this country were formerly much more irascible and vindictive than they are at present: the number of different statutes against going armed, and wearing liveries, are strong proofs of such a disposition and temper. Maihem makes a considerable head of the ancient criminal law, which is an offence we hardly ever hear of at present. Bracton likewise mentions castration as not an uncommon crime, and says the punishment was sometimes death and sometimes banishment [d]. The obtaining deeds by violence or duress makes also a considerable head of the ancient law; and one of the articles formerly given in charge was likewise *de corruptentibus, vel amoventibus divisas*. Riley [f] mentions an intolerable and increasing grievance of prosecuting by appeal in the name of infants, “*par queux ils sont emprisonnes et mult grevez*,” and which occasioned the 31 Edw. I. Stat. ii. entitled, *A Dif-*

[d] Lib. iii. ch. 23.

[f] In his Pl. Parl. p. 292. and in 31 Edw. I.

finition of Conspirators. Many of the old writs in the Register likewise prove this, as the writ *De manso obsessio per quod terra fuit inculta*; — *Quod fenestras in minutas partes secuit*; — and *Quia tenentes non audent morari super terris suis* — These are injuries *non nostri generis, nec seculi*: notwithstanding the general inclination to decry every thing modern, I cannot but imagine, that the inhabitants of this country are, in the eighteenth century, infinitely more virtuous, than they were in the thirteenth; and that the improvements of the mind and regard for social duties have gone hand in hand with the improvements by learning and commerce; nor have I any doubt, but that, if any thing like a regular government continues in this island, succeeding ages will not only be more refined and polished, but consist of still more deserving members of society [f].

At the end of this statute, power is given to the king to make what alterations, from time to time, he shall think proper in these regulations; and the same power (though it might alarm at present) was given to Henry the Eighth, by the statute of Union between England and Wales, till repealed by the statute of James the First. There seems likewise to have been a doubt at this time, whether an act of parliament, passed by the predecessor, bound the succeeding king; for by the *forma concessionis chartarum* (a law of the same session) the prelates, counts, barons, &c. apply to the king, “*Quod cartas a progenitoribus concessas de gratia sua confirmaret*.” and the answer is, “*Nos autem prædictas concessionibus gratas habentes, confirmamus eas pro nobis et hæredibus nostris.*”

There is a period at the end of this law, which, as it is printed in all the editions, is absolutely unintelligible, “*Le rey pur ceo que ses mynistres sovent ou ceste enquerellez devant les avotours des plaintes*.” this should be read *ont été enquerelles* &c. As for the signification of the words *avotours*

[g] I would ask those who think otherwise of the comparison between ancient and modern times, whether they suppose that, in the thirteenth century, any one would have thought of sending 100,000 l. to the inhabitants of *Lisbon* after the earthquake? or would have subscribed to cloath the French prisoners?

des plientes, it is explained afterwards to mean the same with *auditours des plaintes*; I should take these auditors to be the *Masters of Requests*; and some other ancient statute mentions the *Vowters* in Chancery, which signifies some of the officers in that court [b].

[b] This officer, in the Year Book of 9 Edw. IV, T. Pasch. is styled *Boucher*: he seems to have had precedence next to the *Masters* of that court, and it is stated that twenty years experience, was not more than sufficient, to qualify him for the office.

THE

THE STATUTE OF CIRCUMSPECTE AGATIS.

Made 13 Edw. I. A. D. 1285.

SIR EDWARD COKE expressly lays it down that this is a statute, and the words *Circumspecte agatis de negotio tangente episcopum Norwicensem et clerum*, are only put by way of example, and that they extend to the clergy in general. Prynne [i] strongly opposes this opinion of Sir Edward Coke's, and it should seem upon good grounds; his arguments are however too prolix to insert; and I shall therefore only refer to him. One of Prynne's arguments is, that this is not mentioned as a law by any of the Chroniclers of the time, and particularly by Thomas de Walsingham. This assertion hath been found to be true; but Thomas de Walsingham, though he does not take notice of it as a law, yet furnishes us with the real occasion of making this supposed statute; and this occasion shews, that it was probably a writ, or rather instructions, sent by Richard the Second to the judges, than a statute of Edward the First. The bishop of Norwich had preached up a Crusade, in opposition to the king, and with such effect, that the parliament diverted a fifteenth, granted to the king *pro bellatoribus conducendis*, to this bigot's expedition against the Holy land. I shall insert here Thomas de Walsingham's own account [k]. The king afterwards issued a writ

[i] Records, vol. iii. p. 336.

[k] "Diebus quadragesimalibus factum est parliamentum Londoniæ, in quo per plures dies tractatum fuit de potestate concessa per summum pontificem episcopo Norwicensi, et de professione sua contra schismaticos, et factus est ibi motus varius animorum. Nam pars, quorum corda Deus tetigerat, volebat eum proficisci tanquam ecclesiæ pugilem contra hostes Christi: pars adversa repugnabat, asserens non esse tutum committere plebem regis et regni presbytero inexperto: et schisma erat inter eos. Ob quam causam pontificale negotium, simulque totius ecclesiæ, protelatum est usque ad Sabbatum, quo de passione cruceque dominica in universali ecclesia fit mentio specialis. Tandem post multas tergiversationes per duces regni factas, post plures altercationes interpositas per comites, barones, et magnates terræ plurimos, sed omnino Dei virtute,

" et

a writ of *ne exeat regno* to this turbulent ecclesiastick, which he would not obey; and therefore, says the Chronicle, "Rex cepit temporalia episcopi Norwicensis in manus suas, eo quod inobediens erat voci ejus, quando (ut præmissimus) revocavit eum per breve suum, cum paratus esset ad transfretandum, sed tamen episcopus redire noluit." This seems most clearly to explain the occasion of issuing this writ, and indeed the initial words of it; for as this bishop was popular, it was necessary that the king, having seized his temporalities, should direct his officers "circumspecte agere de negotio tangente episcopum Norwicensem, et clerum." As for the word *clerum*, which is here added, I should conceive that it means this bishop's own chapter [1], who were probably involved in the consequence of this seizure of the tempo-

"et laudabili constantia militum parliamentarium conquassata, ipsa die Sabbati hora- que quibus sancta ecclesia vexilla crucis prodisse decantat, omnis repente turba que illi consilio vel parlamento interfuit, et que maxime steterat contra crucis negotium crucisque fidei promotionem, consentit tanquam percussa tonitru fo- lemnis illius Antiphonæ, Ecce crucem Domini, fugite partes adversæ; decre- vitque pro votis episcopi cruce signari. Assignatur ergo sibi per commune de- cretum quinta decima regi præconcessa in superiori parlamento pro bellatoribus condu- cendis. Decima vero Oxoniis præconcessa per episcopos regi remanere statuitur pro maris custodia, idum episcopus agere deberet in remotis. Quibus ita se ha- bentibus, misit episcopus literas sigillo suo munitas per omnes regni provincias, committens rectoribus et vicariis, aliisque curatis per universam Angliam consti- tutis, potestatem audiendi suorum confessiones parochianorum, eisque qui de bonis a Deo sibi collatis aliquid erogarent, unde negotium cruce signatorum promoveri posset, absolutionis beneficium pariter et remissionis autoritate apostolica impendendi, juxta formam bullæ prænotatæ. Igitur regni totius incolæ, auditæ tantæ benedictionis dulcedinem Anglicis advenisse, tantam gra- tiam nec abjicere in vacuum prorsus suscipere voluerunt, sed devotionis fideique calore succensi, qui bello se reputaverunt idoneos, ad proficiscendum se cum omni festinatione præparabant: qui vero professioni videbantur inhabiles, juxta consilia confessorum de bonis suis liberaliter ad opus proficiscentium erogarunt, ut tantæ remissionis et indulgentiæ esse participes mererentur. Et ita generaliter (Deo volente) sunt accensa devotione corda cunctorum, ut penè nullus in tam spatiofo regno reperiretur qui non vel semetipsum offerret dicto negotio, vel de bonis suis aliquid erogaret. Factumque est, ut in brevi magnæ pecuniarum summæ ex multis regni partibus acervatæ episcopo deferrentur, ut jam incepit videri possibile, quod ante regis consiliariis, vel hujusmodi professionis adver- sariis impossibile visum fuit, unde videlicet episcopo, et inter episcopos regni pauperrimi substantia tantæ professioni necessaria ministraretur. Episcopus au- tem non dominos præpotentes, nec eos qui in incerto divitiarum suarum sperant, elegit in consolados sibi, sed mediocres, et qui sine strepitu vel sine pompa dispo- nere bellum scirent et regere bellatores." There are many records in Rymer likewise with regard to this bishop and his expedition.

[1] Thus, in the Chronicle of the Abby des Fontaines, "*clerum* nobilissime auxit, ac regulari ordine secundum egregii patris Benedicti norinant, ut vitam degerent, multipliciter decertavit." Achier. Spic. vol. iii. p. 234. where the word *clerus* most evidently is confined to those who belonged to that Abby.

ralties, and perhaps many of them were ready to embark on this fanatick expedition. The common translation of the statutes, therefore, renders it properly "the bishop of Norwich, and his clergy," not the body of clergy in general.

Abstracted indeed from this explanation from Thomas de Walsingham, by what rule of grammar or construction can a law, which only mentions the bishop of Norwich and his clergy, or chapter, be extended to all ecclesiasticks in general [m]? By the same rule of construction, the statute of regulations for the city of London (last commented upon) might be extended to all the great towns in the kingdom [n].

[m] If it be contended, that the word *clerum* does not signify the chapter, but the whole body of the clergy; this is contrary to a rule in the construction of statutes, "that, if particular words are followed by those which are more general, the more general words shall receive a confined construction:" as what is first mentioned, must be supposed to have been chiefly in the contemplation of the legislature.

[n] There is considerably more of this statute in the original Latin, than hath been translated by the Editors of the statutes.

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ORDINATIO PRO STATU HIBERNIÆ,

Anno 17 Edw. I. A. D. 1288.

IT is very singular, that, though this Ordinance hath found a place amongst the English statutes, the collection of Irish statutes, printed by authority at Dublin, begins only with the Ordinances of *Kilkenny*, in the third year of Edward the Second. There can be no doubt however, that this law extends to Ireland, if not repealed by some Irish act of parliament; as by *Poyning's law*, in the time of Henry the Seventh, all precedent English statutes are made to bind in Ireland [7].

Notwithstanding what hath been said by many Historians of the total conquest and submission of Ireland to Henry the Second, Sir John Davis very properly observes, that this supposed conquest did not extend much further than the neighbourhood of Dublin: for with what propriety can that be called a conquest, where the conqueror cannot enforce his own laws and regulations? It was by degrees only (and those very slow ones), that they were civilized and brought to a state of submission. *Freiffart* gives an account of a very singular conversation, which he had with *Henry de Bastide*, who was an equerry to Richard the Second, and attended him in his expedition to Ireland. This Bastide was, in his youth, a retainer to an earl of Ormond; and, by a fall from his horse on an attack of the wild Irish, was taken prisoner by them, continued seven years in captivity, and married a daughter of one of their chieftains. By this means he spoke the Irish as fluently as he did English, and was pitched upon, by Richard the Second, to attend four Irish kings, who came to do homage

[7] Subsequent statutes only bind if Ireland is mentioned; as for Wales, all statutes are now made to extend to it, whether mentioned or not, by a clause inserted in the middle of 20 Geo. II. ch. xlii. the title of which is to explain and amend the *Window-Tax Act* of the same year. Mr. Cay, in his very accurate Index, hath very fortunately taken notice of this law under the title of *Wales*, otherwise the principality might possibly still continue in ignorance of such a law.

to him whilst he was in Dublin. The whole account of their reception and entertainment very much resembles that which we have shewn lately to Cherokees and Mohawks: "Et estoient les quatre roys tres richement vestus" (at the expence of the English) "et s'affirent ce jour a la table du roy "Richard" (before this he mentions, that every thing was in common between these kings, and their servants), "et devez scavoir qu'ils furent multes regardez des seigneurs, et de ceux qui la estoient, et a bonne cause, car ils estoient moult esranges, et hors de contenance des ceux d'Angleterre, et d'autres nations, et nature s'encline volontiers a veoir choses nouvelles; et pour lors certainement (Messire Jehan [p]) c'estoit grande nouveaute a veoir ces quatre rois d'Ireland. Messire Henry (respondy Je lors [q] &c.)" The same author afterwards says, that the cause of these four kings [r] being willing to do homage to Richard chiefly arose from his bearing the arms of Edward the Confessor, which are "une croix potencee d'or et de gueules, a quatre colombs blancs au champ de lescu et de banniere", instead of the arms of England, which were then *Leopards*, and not *Lions*.

Much later than this, in the year 1446, a parliament was held at *Trim*, in which they were directed not to suffer their beards to grow on their upper lip, nor to wear shirts stained with saffron [s]; and still later, *Spenser*, in his Dialogue upon the State of Ireland, says, that, in the time of Queen Elizabeth, they let their hair hang so far over their faces,

[p] Jehan Froissart, to whom Bastide speaks.

[q] Froissart, livr. iv. p. 264, & seq. printed at Lyons by Jean de Tournes, without date.

[r] Their names may be seen in Froissart.

[s] Notwithstanding an Irish statute of Charles the First, that *opprobrium* of the Irish of plowing by the horses tails, still continues in the North Western parts, as it does in the N. W. Highlands of Scotland; it arises, I should imagine, from not being able to purchase collars and other more convenient harness: as for the barbarity; the custom which prevails in *Somersetshire*, and the North of England, to pluck the feathers from live geese seems to equal it. There is an Irish statute likewise against the practice of tearing the wool off the backs of live sheep, instead of shearing; as also against the practice of burning the corn, instead of threshing it. I have been informed, that this continues in some of the Western parts of Ireland; and indeed burning the corn is the practice in many parts of Asia. I have likewise been informed, that, in the neighbourhood of Geneva, the oxen draw by their horns without any collars.

that

that it was difficult to distinguish one from another; and this difficulty greatly favoured their thefts and rapines on the English. There was indeed a statute made at Kilkenny, in the fortieth year of Edward the Third (whilst the duke of Clarence was lord Deputy), to abolish the *Brehon*, and introduce the English laws [*t*], but this law was certainly never carried into execution beyond the English pale, any more than another made in the tenth of Henry the Seventh, by which the use of the Irish language was forbid under penalties [*u*]. The first statute, which thoroughly established the dependance of the Irish, was the famous law of Sir Edward Poyning, who was Lord-Deputy of Ireland in the reign of Henry the Seventh.

If what hath been here contended for wanted any additional proof, the present statute supplies it; as it consists of eighth different chapters, and not one of them abolishes any of the Irish customs, or Brehon law: the regulations have nothing very particular in them, and are calculated only for the English pale.

I shall therefore make no observation, except on the 5th chapter, which directs, that the fee of the marshal, or gaoler, from the prisoner, when he is set at liberty, shall not exceed 4*d*. This seems most clearly to prove the right which the gaoler hath to a fee by the common law. As the criminal is almost always in necessitous circumstances, the payment of this fee is often disputed, and always most justly complained of: the remedy however seems to be by settling a proper salary on the gaoler, as otherwise he is most clearly entitled to it. Many, who exclaim against the gaoler's fees as unreasonable, may not perhaps know that a secretary of state, or his officers, claims a fee of two guineas for an answer to the judges representation, that a criminal is a proper object of the king's mercy, upon condition of transportation.

[*t*] There is, in Riley's Pl. Parl. a writ to the Justice of Ireland, in the fifth of Edward the Third, to the same purpose, p. 586, as also another, p. 569.

[*u*] Lord Bacon, in a letter to Secretary Cecil in 1601, recommends the reforming the barbarous laws, customs, habits of apparel, as also their poets and heralds, who enchant them in savage manners, and sundry other such dregs of barbarism, vol. iii. p. 226.

As in the Comment upon Magna Charta, I have mentioned the ceremonies through which a Scotch act of parliament passed, before it became a law: I shall here take notice of the ceremonies and checks requisite with regard to an Irish statute.

Sir Edward Coke [w] informs us, that the order of proceedings and summons in parliament is first, that the Lieutenant and Council do certify, under the great seal of Ireland, the causes and considerations of all such acts as seem good to them to be passed in parliament: they are then to be affirmed, altered, and returned under the great seal of England [x].

The Justice of Ireland, mentioned in this statute, answers to the Lord Lieutenant, and was rather a military than civil officer; the Lord Justices of Ireland at present have *Aid de Camps*, though they generally have consisted of an Archbishop, Chancellor, and Speaker of the House of Commons.

There have been great and learned controversies between Molyneux and others with regard to an English act of parliament binding in Ireland; and Molyneux, who contends it should not bind, hath argued strongly from an English statute's not being supposed to extend to Ireland, before Poyning's act in the reign of Henry the Seventh. There is a note on the roll of the twenty first of Edward the First (entitled, *de malefactoribus in Parci*;) in these words: "Et memorandum, quod istud statutum de verbo ad verbum missum fuit in Hiberniam, teste rege apud Kenynton, 14 die Augusti, anno regni sui vicesimo septimo: Et mandatum fuit Johanni Wogan, justiciario Hiberniæ, quod predictum statutum per Hiberniam, in locis quibus expedire viderit, legi et publice proclamari ac firmiter teneri faciat." This note most fully proves, that the king, by his sole authority, could introduce any English law; and will that authority be lessened by the concurrence of the two houses of parliament? There is also an order of Charles the First, in the third year of his reign, to the treasurers and chancellors of the Exchequer

[w] In his 12th Report, p. 109.

[x] See 3 and 4 Phil. and Mar. ch. iv. Irish Stat. which is entitled an act declaring how Poyning's law shall be expounded and taken.

both of *England and Ireland*, by which they are directed to increase the duties upon Irish exports [y]; which shews that it was then imagined, that the king could tax Ireland by his prerogative, without the intervention of parliament. What would have been the answer of an English parliament, in the year 1650, to the late claim of independency in the colonies, will appear by the preamble to an ordinance of the 3d of October of that year: "Whereas in Virginia and the islands of St. Christophers, Nevis, and Montserrat, and divers other islands and places in America, which were planted at the cost, and settled by the people and authority, of this nation, which are and ought to be subordinate to, and dependent upon, England, and hath ever since the planting thereof, and ought to be subject to such laws, orders, and regulations, as shall be made by the parliament of England [x]."

[y] Rymer, vol. iii. part ii. p. 205.

[x] Scobell. part ii p. 132.

THE STATUTE OF WESTMINSTER

THE THIRD,

Viz. *QUIA EMPTORES TERRARUM,*

Anno 18 Edw. I. A. D. 1290.

IT should seem, that, before this statute, no one, who held land under a superior Lord by any services, could alien without his licence. As the Lord probably insisted upon large fines on such a licence, the freeholder holding under him, and who now began to be rather more independent, used to make secret feoffments, by which the Lords lost their escheats, wardships, &c. *quod durum magnatibus videbatur*, says the statute. They thought it therefore, on the whole, convenient to permit such alienation, provided the alienee held by the same services under the superior Lord, by which the enfeoffor held before such alienation, and by this means the change of tenants became a matter of indifference: this therefore may not be improperly styled the first great Statute of *Alienation*.

It consists of three short chapters, and nothing occurs further, which it is material to observe upon, except that this statute is likewise to be found in Riley's *Placita Parliamentaria*, which begin with the eighteenth year of Edward the First; and that the style of this king is, for the first time, *Edward the Son of Henry* [a], which I should conceive he had assumed to distinguish him from the two Edwards kings of England before the Conquest. Thus likewise Edward the Third, for a considerable time, styled himself *Edwardus, filius Edwardi, Edwardi filii*, but afterwards changed it to *Edwardus post Conquestum tertius*. Sir

[a] This style is not in the original, but only in the translation.

Edward Coke hath, in his *First Institute* [b], given an account of the different styles assumed by the kings of England, in order to detect spurious records or deeds which may have been forged; he hath however omitted the change of style abovementioned, both by Edward the First and Edward the Third.

[b] P. 7. B.

STATU-

STATUTUM DE MONETA,

20 Edw. I. A. D. 1292.

I SHALL consider this statute with two other laws which passed the same year (entitled, *Statutum de Moneta parvum, et articuli de Moneta*) as forming but one statute, though they are printed in all editions as distinct ones: in the twenty-seventh year of this king's reign, is likewise another statute to the same purport, entitled, *Statutum de falsa Moneta*.

These are the first regulations with regard to the coin, at least regulations by authority of parliament [c]: before this, one of the Chronicles informs us, that in the reign of King Stephen, *omnes potentes, tam Episcopi, quam Comites et Barones, faciebant monetam*; but Henry the Second, on his accession to the throne, *novam fecit monetam, quæ sola recepta et accepta in regno*. This wise alteration made by Henry the Second [d], in bringing all the money of the kingdom to be coined at the Royal Mint, seems to have been acquiesced in; but though it in some measure provided against the circulation of base coin at home, it could not prevent its being imported. It is very remarkable, that there does not seem to be the least idea of debasing the coin in this country, and that all the regulations of these early statutes are calculated to prevent its being introduced from abroad, particularly from *Avynein*, which I take to be the same with *Avignon*. Above a century before this, there had been very severe examples against persons convicted of this offence. The Chronicle of the Abbot of St.

[c] Sir Thomas Rowe, in a very able speech made in parliament on the subject of coinage, cites this passage from the *Miroir des Justices*, "Le roy ne veot sa money impare ne amender, sans l'assent des tous les counties." Rushw. Coll. vol. ii. p. 1218.

[d] Philippe le Bel was the first king of France who claimed the sole prerogative of coining money, Boulainv. vol. ii. Before this (as in England) the Great Lords coined within their own Seigneuries.

Peter

Peter de Burgo [e] says, that, in the year 1125, "Justitia de monetariis fit per Angliam quibuldam suspensis, quibusdam dextris manibus amputatis, et aliis testiculatis, et mutilatis [f] ;" and Thomas Wykes [g], in his Chronicle, mentions, that, in the year 1278 (which was but fourteen years before the present statute), many Jews were executed in England for the same offence. It hath already been observed, that, upon a regulation's taking place in England, the same regulation is soon adopted in France, or *vice versa* ; and therefore, in the year 1306, there are French ordinances similar to the present, and which were occasioned by the coin in that kingdom being so debased, that there was a general insurrection of the lower artisans at Paris [h].

No mention is made of gold coin in this statute, which is generally agreed not to have been introduced till the reign of Edward the Third, which the silence of the Records in Rymer, till the seventeenth year of that reign, seems to confirm. Maitland however proves, that gold was coined earlier [i], which I should rather suppose to be medals upon coronations or some other great solemnity, than that it was commonly circulated as money.

Though the offence of debasing the coin is simply forbid by these statutes of the twentieth year of Edward the First, yet in seven years afterwards, by the 27 Edw. I. St. iii. it is made capital, and afterwards, by the twenty-fifth of Edward the Third, it is declared to be high treason ; and even unlawfully making or having coining-tools or instruments, is made the same offence by the eighth and ninth of William the Third. I do not mean to condemn these laws as severe, but there seems to be an impropriety in making a crime the same, or classing it with treason, which hath no im-

[e] Published by Sparkes in 1724.

[f] It is very remarkable, after this instance of capital punishments, that the present statute is so far from making the offence felony or treason, that it is contented with merely *forbidding* the crime.

[g] Gale's Collection, vol. iii. p. 107. where the bad consequences attending this offence are very sensibly set forth.

[h] Chronique de France, par Maistre Nicholle Giles, Paris 1556.

[i] Hist. of Scotland, vol. ii. p. 218. See further on this head in the comment on 23 Hen. VIII.

mediate relation to it, especially as there seems to be no material difference to the criminal, when convicted, whether he suffers as a felon or as a traitor ; and the blanching copper, in order to counterfeit silver, is only made felony by the sixth section of the same statute.

in the present case (which we will consider in a moment), many Jews were executed in years before the present nation; many Jews were executed in England for the same offence. It hath already been observed, that upon a regulation's being made in England, the Jews registered as being subject in France to the same law; and therefore, at the present time, there are French witnesses available to the present, and which will certainly be sufficient in that respect to show, that there was a general prohibition of the Jews in France.

[illegible]

Through the office in London the coin is largely made by the Bank of England. It is the standard year of Edward the First, and is valued at 100 shillings. It is the only coin of Edward the First, and is valued at 100 shillings. It is the only coin of Edward the First, and is valued at 100 shillings.

STATU-

[illegible]

medic

STATUT. DE IIS QUI PONENDI SUNT IN ASSISIS.

21 Edw. I. A. D. 1293.

THE preamble to this statute confirms what I have before observed, that the great reason for the common law's encouraging the local trial of actions, does not arise from neighbours best knowing what relates to their neighbours, but to prevent the expence and inconvenience of a jury's attending at a great distance. "Dominus rex per publicam et frequentem populi sui querimoniam attendens, et quod sæpius intolerabiliter fatigantur," &c. The statute indeed goes further than directing that they shall not be summoned out of their own counties, and orders that the jurors shall have forty shillings a year; which, from the value of money at that time, not only secured a substantial jury, but prevented the expence of attendance to those who could less afford it.

The chief reason however of my making any observation upon this statute is, to rectify a mistake both in the original and the translation, which are absolutely unintelligible: "Quod nullus vicecomes, subvicecomes [t], vel eorum ballivi, senescalli, five ballivi libertatum de cetero ponant in aliquibus recognitionibus aliquem (de ballivis suis extra comitatum) faciendis, nisi habeat terras," &c. This is translated, "That no sheriff, under-sheriff, or their bailiffs, stewards, or bailiffs of liberties, shall from henceforth put in recognisance that shall pass out of their proper counties any of their bailiffs, except he have lands," &c.

The word *ballivis*, is a word of equivocal signification, it is either the dative or ablative of *ballivus* (the officer called a Bailiff); or it is the dative or ablative case of *balliva*, which signifies a bailiwick, or district of a county where the lord's

[t] This is the first instance of mentioning the office of under-sheriff.

bailiff,

A CONFIRMATION OF THE CHARTERS.

Made in the 25 Edw. I. A. D. 1297.

THE occasion of this confirmation of Magna Charta, and the Charter of the Forests, hath already been mentioned in the Observations upon Magna Charta.

Though it is only entitled, *A Confirmation of the Charters*, it seems to contain additional matter, which is perhaps of more constitutional importance, than all the provisions of the two Great Charters.

The first is, that no grant given by the free will of the people shall, by force of precedents, become a cause of *Bondage*; and the second, that neither from archbishops, bishops, abbots, priors, counts, barons, or the *commonalty of the land*, on no pretence, shall any aid or tax be taken or levied, but by the *common assent* of the realm and for the *common profit* thereof. From this time, the commons necessarily became an important branch of the legislature [m].

“*Scilicet et rerum facta est pulcherrima Roma.*”

Can it be imagined, that this parliament would have permitted the king to levy ship-money?

This statute consists of seven chapters; in the third the *Charters* are ordered to be read [n] in every cathedral church twice a year; they must therefore be in the archives of every ancient cathedral, if not mislaid or destroyed [o].

The 7th and last chapters mention the oppression *de la male-toute des leynes*, which is translated *maletent of wools*; it should be however *maletolt*, which was a name given by the French to an ancient and oppressive tax on salt; as appears by all their old Chronicles. Boulainvilliers mentions a pun of

[m] Pasquier supposes that the *menu peuple* were first permitted to have a share in the French legislature, “*that they might be taxed the more severely under pretence of its being with their own consent.*”

[n] The most dignified clergy, and probably the most learned, belonged to the cathedrals; it is much doubted whether the parochial clergy could read at this time.

[o] Collier, in his Ecclesiastical History, mentions, that the authenticity of the copies of *Magna Charta* hath by some been much suspected, vol. i. p. 429.

Edward the Third, with regard to this tax, who called Philippe le Bel, continuing to levy it with oppression, *son frere de la loi Salique*.

After this confirmation of the Great Charters, follows the famous sentence of excommunication by the archbishop of Canterbury, said to be taken from a very ancient manuscript. By the ecclesiastical law, three admonitions are necessary before this dreadful sentence can be passed; the archbishop, however, probably animated with particular zeal, by Edward's having rifled all the monasteries to carry on his wars [p], admonishes them *once, twice, and thrice* by the same instrument, "Pur ceo que le breste du temps plus long delai ne suffre; and then whoever shall contravene, or in any way assent to the contravening, any of these articles, "Escom-mengeons del corps notre Seigneur Jesus Christ, et de tote la compagnie de ciel, et destous les sacrements de seintz esglise deseverums. Fiat. Fiat. Amen." Fleta [q] gives a very particular account of what passed at the time this sentence of excommunication was pronounced.

[p] See comment on Magna Charta. This distress of Edward's probably occasioned likewise the statute *De libertatibus perquirendis*, made in the twenty-seventh year of his reign.

[q] L. ii. ch. 42.

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STATUTUM DE FINIBUS LEVATIS,

Anno 27 Edw. I. A. D. 1289.

THE preamble to this statute, made but two years after the Confirmation of the Charters, recites the great grants and supplies which Edward had received from his subjects, and which he mentions as *the sole reason for having made this confirmation*, “ de nostra propria voluntate; which seems fully to prove (what I have before observed) that it was by no means an established law at this time, that an act of parliament bound the successor, but only the king on the throne. The statute then recites Edward’s great distraction on account of his wars, and likewise his expectation of a *Nuncio* from the pope, “ ad negocia expedienda, quæ “ ita sunt ardua, ut non solum nos, et regnum nostrum, sed “ totam Christianitatem contingunt, et ad ea sanius pretrac- “ tanda totum consilium nostrum habere plenarie indige- “ mus.” This important business to be settled with the pope, was probably the claim which he had made to a supremacy in Scotland; and though such a claim deserved rather resentment than a solemn discussion, yet Edward, at this period of his reign (*reclament licet Historici*), was upon so bad terms both with people and clergy, that he did not choose an open rupture with the pope.

The statute consists of four chapters, and the first states the great perjury which prevailed amongst jurors at this time, which offence in a witness was not now punishable by any act of parliament; it may be perhaps thought a reflexion on the common law to assert, that this crime was totally without any punishment; and yet we do not hear of any such prosecution, except the attain of a jury be considered as such. The convictions by attain however became now less frequent; and jurors seeing witnesses take liberties with their oath (and with impunity), were encouraged to take the same liberties them-
I selves.

selves. The form of the oath at this time was [r], *So help me God and the Saints*, and I do not find that the witness was sworn upon the *Evangelists*, which perhaps might contribute to irreverence in the observation of it. I have not been able to discover the precise year or reign, when the oath was altered in the conclusion of it to *So help you God*; but, from the omission of *Saints*, this alteration probably took place soon after the Reformation: I should think, that no court hath power, by the common law, to make such an alteration in an oath, and that it was worthy of, and required the intervention of, the legislature [s].

The second chapter relates to regulations in the Exchequer, which Dalton [t] particularly recommends to be attended to by this officer. One of the regulations is, "Quod unus Baronum, et unus clericus de Scaccario mittatur per singulos comitatus Angliæ, ad imbreviandum nomina omnium, qui anno illo debita per viridem ceram ab eis exacta solverunt." This, with other statutes, proves what I have before observed, that the Barons of the Exchequer were not considered formerly as merely judicial officers.

The third chapter directs, that justices of assize shall be justices of gaol delivery, and that, *after the civil business* is finished, they are then to proceed to deliver the gaol [u]. It then makes a distinction between the justices, when *laymen* and when *ecclesiasticks*; if both the justices are *laymen*, they are to continue in the county, and deliver the gaol; if one of them is an *ecclesiastick*, then the lay judge is to associate to himself one of the most discreet knights of the county [w].

[r] Si Dieu m'aide et les Seintz. Stat. Exon. 14 Edw. I.

[s] I would not be understood by this to condemn the alteration, but only the method of making it.

[t] In his office of Sheriff.

[u] On the contrary, a proclamation of Queen Elizabeth is mentioned by Fabian Phillips (on Purveyance, p. 427.) which directs the judges to begin with the gaol-delivery, and proceed in it as far as can be conveniently done, before they begin the civil business, which is indeed the present practice.

[w] The Marca Hispanica gives an account of the lay judge and bishops sitting together in the same court, and the criminal was tried by the lay judge; but if the crime was to receive a particular punishment by any canon, and *that not a capital one*, the bishop pronounced the sentence, p. 314. Paris 1688, Folio.

From these regulations it appears, that, for the trial of criminals, it was necessary that two judges should preside, for the greater solemnity; and that, in the trial of civil actions or *assises*, the judge was frequently an ecclesiastick [x]. The clergy however would not interfere in the trial of criminals, this being contrary to their *canons*, which will not permit them to determine in *cases of blood* (as they are called). The meaning of which canon (I should conjecture) is, that the office of a criminal judge was anciently considered as partaking of the nature of an executioner, and therefore deemed an office of blood, which was supposed rather to detract from that reverence and good will which the canons of the church endeavoured to procure and establish to the body of the clergy.

[x] It appears by Bracton, that, in the time of Henry the Third, Justices were appointed for the trying of particular causes: "Sunt autem iustitiani ad quasdam causas, duas vel tres vel plures, qui quidem perpetui non sunt, quia, expleto officio, jurisdictionem amittunt." Bract. l. iii. ch. 10.

STATUTUM DE WARDIS ET RELEVHIS,

Anno 28 Edw. I. A. D. 1300.

WHOEVER reads this supposed statute (and which is very short) must at once see, that it is only a remark made by some lawyer with regard to Wards and Reliefs: the style is not unlike that of Littleton, "Vous devez scavoir," &c. "Ore vuez la nature de Garde," &c.

It is well known, that Wardships are now abolished by the twelfth of Charles the Second, re-enacting an Ordinance of the Common-wealth: it appears, however, by a letter written by Sir Robert Cecil to James the First (then considered as certain successor to the crown of England), that it was the advice of himself and others, even at that time, to abolish them: "They are (says he) the ruin of all the noble and ancient families of the kingdom, by base matches and education of children, and by which no revenue of the crown will be defrayed [y]."

There is an ancient law of William the Conqueror with regard to Reliefs (the other object of this supposed statute), which it may be perhaps matter of curiosity here to insert.

"De relief al Cunte que al rei affert 8 chevals selez et enfrenez. Les quaters halberts, e quaters escus, e quaters lances, e quaters espes; les altres quaters chaceurs, e palfreis afrenis, e achevestres [z]."

[y] Appendix to Robertson's History of Scotland, p. 1117.

[z] Inter Leg. Gul. Conquest. Wilkins, p. 233.

A STATUTE FOR PERSONS APPEALED,

Anno 28 Edw. I. A. D. 1300.

THE appeals which this law relates to, are appeals by *Approvers*. The prosecution of criminal offences by this sort of informer, is now totally disused, though I am not aware of any statute which hath expressly abolished it. It seems to be agreed by the writers on the Crown law, and particularly by Staunforde (who wrote his Treatise before the entire disuse of this method of prosecution), that an Approver must have been an accomplice actually indicted for the offence with which he charged his associates; and that, upon his offering to become a witness, it was the duty of the coroner to take his examination: we find by this statute, that he was then to be detained in prison till the trial of his accomplices, after which (*in case they were convicted*) he might claim his pardon. It must occur to every one, that evidence thus procured was of the most suspicious nature; and 5 Hen. IV. ch. ii. recites, that “diverse notorious rogues, for safeguard of their lives, had become *provers*, to the intent in the mean time, by brocage and great gifts, to pursue and have their pardons, and then, after their deliverance, had become more notorious felons than before.” It is then enacted, that he who solicits the pardon of such an approver, shall indorse the charter with an acknowledgement that it was procured at his instance; and if the approver is afterwards guilty of a felony, the person so indorsing the pardon is to forfeit 100*l*. It was this regulation which probably occasioned the disuse of prosecuting by approvers, though the writers on the Crown law are silent on this head; they were generally men of an abandoned character, and therefore it was not easy to procure a person who would be surety in such a sum; whereas before this statute the pardon was granted almost of course. Every material alteration of this sort in the law deserves to be traced to its original source; and that is generally to be found in the preamble, or other part of the ancient statutes, if they are perused with attention.

To the prosecution by approver hath succeeded the more modern practice of allowing the evidence of an accomplice, with either an actual promise of pardon from the king, or an expected one by the intercession of the prosecutor. This is preferable to the prosecuting by approver in this circumstance, that the accomplice (in the latter case at least [a]) cannot claim the pardon *as of right* upon the conviction of the criminal; besides, that no execution was ever permitted on the evidence of an accomplice only, if not corroborated by other circumstances; a merciful precaution, which we do not hear of when approvers were the witnesses. The Civil law says,

Non elatione criminum, sed innocentia, reus purgetur

[a] There seems, however, to be some objection to the form in which the secretary of state commonly promises the pardon to the accomplice, viz. upon the criminal's being apprehended and *convicted*. The testimony of such an accomplice would be less liable to exception, if the pardon was granted upon his giving evidence generally, let the event of the trial be what it may,

ARTICULI

ARTICULI SUPER CHARTAS,

Anno 28 Edw. I. A. D. 1300.

IT hath before been observed on the statute made in the twenty-fifth of Edward the First (entitled, *Confirmatio Chartarum*), that there seems to have been a doubt, whether the king on the throne was bound by the laws of his predecessor; the present preamble furnishes an instance of another as extraordinary a doubt, viz. whether when a statute forbids any thing, and subjoins no penalty, it can be enforced. The punishment therefore, which is declared by the first chapter, against those who may break through any of the articles of the charters, is fine and imprisonment, according to the circumstances of the case; and this punishment the superior criminal court had most undoubtedly a right to inflict, before this statute was in force. This, amongst many other instances of the same sort, should make us cautious of taking it at once for granted, that what is now most clearly established and settled law, might have been so understood in this country some centuries ago. Another striking instance of this is the king's power of dispensing with statutes by a *non obstante*; a power which he seems most undoubtedly to have had, and repeatedly exercised, but which at present seems to shock almost common sense upon the mention of it, and which we may flatter ourselves therefore can never be revived. The same observation may be made with regard to the prerogative of creating *boroughs*, with the franchise of sending members to parliament [b].

The 2d chapter of this law is levelled against the extortions of *purveyors*. These officers were established formerly in England and in every part of Europe, and from the same cause (the want of regular and well-supplied markets); their

[b] Thus Whitelock (in his Commentary on the writ for choosing members of parliament) asserts, that "doubtless the king may grant to as many places as he pleases the privilege of sending members to parliament," vol. i. p. 501.

oppressions and exactions have every where [c] either abolished the office, or laid them under severe restraints and penalties, if they abuse it. Eadmerus informs us, that, in the time of Henry the First, the peasants and farmers, when they heard of the king's approach, deserted their houses.

Fabian Phillips is the only advocate that these officers have ever had, and in his time the rigour of exacting purveyance was much abated, as the kings of England were either resident at Westminster, or did not move far from it; besides, that most of the counties payed a regular and not very considerable tax, to be excused the payment [d]. It was in the royal progresses that this odious right was most severely felt; and it appears from Rymer's collection of Records, that there are hardly two, following each other, which bear date from the same place. Machiavel [e] says, that the ancient establishment, during a royal journey or progress, was a *sous* per day for a bed, and 2 *sous* for linen and vinegar. I do not find that any such regulation, or fixed allowance, was established in England; but the present and other statutes direct, that the purveyors shall allow a fair price; if it is said, such a price being payed, there is no great inconvenience or oppression, yet it must be allowed, that there is a mortification in obliging any one to part with what perhaps he sets a false and only imaginary value upon.

As this statute is a *Capitularium*, consisting of twenty articles, and which relate to things of a very different nature [f], it is not therefore possible to reduce the observations to
be

[c] Lady Mary Wortley Montague takes notice, that in Turkey, when the purveyors have rifled every thing from the house, they then make the owner pay a second tax for the detriment which the purveyors' teeth may have been supposed to suffer, by the eating of what they have before injuriously extorted; and this is called *Tooth money*. There is a very spirited speech of Lord Bacon's against the abuses of these officers, in which (amongst other particulars) he mentions, that after the purveyor had agreed to give a price for the goods which he wanted, he then insisted upon a deduction of so much in the pound, before he would pay the king's debts, vol. ii. p. 150.

[d] The proportion which each county paid may be seen in Philip's Treatise, as well as many other curious particulars: the receiving of purveyance in kind, occasioned the magnificent kitchen-establishment of the ancient kings of England.

[e] In his *State of the Kingdom of France*.

[f] The 8th and the 13th chapters happen to relate to the election of sheriffs, and

be made upon it to any order or connexion, but each chapter must be considered as a distinct law.

By the 8th chapter, the king grants the election of sheriff [*g*] (where it is not an office in fee) to each particular county, *if they list*, as the statute says. Many statutes, previous to the present, take notice of the great oppression of sheriffs; one reason of this was, that this officer formerly farmed the king's revenue, and therefore, like other farmers of taxes, was not only to supply the king's, but his own wants. He sometimes only collected the revenue, and sometimes had the charge likewise of stocking and taking care of the crown lands, instances of all which may be found in Maddox's History of the Exchequer. The abuse which was most exclaimed against at this time [*b*] was the harassing jurors unnecessarily, by summoning them from a great distance, and likewise returning those who would not give a fair verdict between the parties: an abuse never thoroughly removed till the late act for balloting.

The 11th chapter forbids maintenance and champerty [*i*], which is frequently provided against by subsequent statutes, and which therefore must have been as frequently practised, though we never hear of such a prosecution at present. The reason of this seems to have been, that, when a man of power formerly supported a law-suit, the judges were influenced in their determinations, as they are now in every part of Europe, except in this happy and free country. Instances of the great corruption in judges at this time may be found in the Parliamentary History [*k*], which cites Hollinshead for an account of every judge in the superior courts (except

and yet four chapters intervene between them: the same want of connexion or order is to be found in all the *Capitularia*, which word I make use of, because we have no English term to signify such a collection of laws.

[*g*] It appears from the Parl. Hist. vol. i. p. 118. that, in the Reign of Edward the First, it was attempted not only to establish the election of the Sheriff in the people, but likewise the Treasurer, Chancellor, and Chief Justice.

[*b*] Ch. ix. The 13th chapter likewise mentions their lodging with great trains at houses.

[*i*] By the 31 Edw. I. Stat. iii. the punishment for champerty is no less than three years imprisonment. It was therefore a growing evil.

[*k*] Vol. I.

John

John de Mekingham and Elias de Bekingham) being most severely fined to the amount of 10,000 marks.

The laws against champerty and maintenance are not confined to England; it is made criminal in Scotland by many of those ancient statutes, which are collected under the title of *Black Acts*, from their being printed in the *Old Black Letter*.

The 16th chapter directs, that the regulations of the second statute of Westminster, with regard to false returns made by bailiffs, shall be put in execution, and enforced by the same penalties, without adding any thing further; which shews, that even recent statutes were disobeyed, and wanted perpetually a new promulgation. The 17th chapter therefore orders the Statute of Winton to be read four times every year in each county: and the Charters, instead of being read in every cathedral as by the former act of the twenty-fifth of Edward the First, are now to be read four times a year by the sheriff.

There are some mistakes in the translation of this statute: in the 5th chapter, which in reality is a continuation of the 4th, and governed in its construction by it, *d'autre part, le roi veut que sa chancellerie*, should be rendered, *on the other hand*, and not *on the other party*.

In the 7th chapter, *le constable du chatel de Douvre* [1] *ne plede desormes a la porte du chastel*, should be translated, *at the castle-gate*, and not *within the castle-gate*. The gates of towns have in many countries been made use of for the purpose of administering justice. Thus in the Psalms, *Thou shalt not be afraid to speak with thy enemy at the gate*; meaning you need not fear the prosecution of your enemy. [m]. Lord Bacon hath (somewhere) from this observed, that the courts of justice amongst the Jews were open.

[1] The Charters of the Cinque Ports were published by Jeak in 1727; and it appears by records there cited, that the Cinque Ports (about this time) had many disputes with regard to their jurisdiction, and particularly with the port of Yarmouth: their consequence probably arose from their situation, calculated either to invade or resist an invasion.

[m] "Allons voir les plex de la Porte que on appelle maintenant les Requestes." Vie de St. Louis, p. 13. Paris, 1761.

In the 18th chapter, the words *vivers* is translated (and properly) a *warren*, and not a *pond*, as I have before contended in the Comment on the Charter of the Forests. The best expositer of the meaning of an author, is another part of his works, and the successive legislatures must be considered as constituting one author.

ORDINA

ORDINATIO FORESTÆ,

Anno 34 Edw. I. A. D. 1306.

EDWARD was now sixty-eight years of age, and consequently from infirmities no longer able to follow his favourite amusement of hunting, which Thomas de Walsingham informs us he was immoderately fond of. The offences of destroying the game, which formerly excited his warmest resentment, appeared now but venial faults; and therefore he very willingly acquiesced in the mitigation of the Forest laws, and the punishment of those officers who had been guilty of unnecessary rigour and extortions. The preamble to this statute seems to have been drawn by his *Confessor* [n], attending him in a fit of illness: “Dum imbecillitatis
 “humanæ conspicimus in imperfectum [o], ac onera longe
 “lateque diffusa humeris nostris incumbencia attenta consideratione pensamus, intus nimirum diversis puncturis cordis
 “torquemur, diversorum cogitatum fluctibus agitati, et
 “vexamur frequenter noctes ducendo insomnes, quid agendum, quid tenendum, quidve exequendum existat, inter
 “præcordia hæsitantes; in eo tamen qui supra cuncta tenens
 “in excelsis imperium, qui dat esse rebus, et dispensat prout
 “vult munera gratiarum (cum sapientiæ suæ magnitudinem
 “humani non capiunt intellectus) virtutes resumimus; sperantes quod in serviciis suis perficiat actus nostros, et suæ
 “bonitatis clementia nostram misericordiam videat, et suppleat imperfectum, ut ipsius fulti præsidio per viam mandatorum Domini dirigamur.” The whole indeed of the preamble is infinitely more florid, than any other to be found in the Statute-book; and, if I may be indulged in the con-

[n] Collier, in his *Ecl. Hist.* mentions the pope's having absolved Edward the preceding year from adhering to the provisions of Magna Charta, *since he swore at his coronation to maintain the rights of his crown*, vol. i. p. 499.

[o] This should be *imperfectionem*. The word *imperfectum* is however afterward repeated.

jecture of its being drawn by Edward's confessor, I should further suppose that this confessor was an Italian [p].

The regulations of this statute contain nothing that requires either illustration or observation:

[p] Many of the early records in Rymer are in a florid style: most of them however are letters from the pope: I must except letters from Eleanor, mother of Richard the First, during his captivity in Germany.

STATUTE

STATUTUM DE APPORTIS RELIGIOSORUM

35 Edw. I. A. D. 1307.

THOUGH the title of this statute is *De apportis* [q] *religiosorum* in general, yet from every regulation it seems to have been chiefly levelled at aliens possessed of priories and abbeys, who resided in other countries. The pope at this time had the power of conferring many of the abbeys and priories, which he generally gave to Italians; the religious houses however, under no kind of control from their superior, who lived in another country, not only slighted his visitatorial injunctions, with regard to their own reformation and discipline, but likewise withheld the superior's rights and dues, especially as most rents were at this time paid in kind, which were of no advantage to an absentee, who could not consume them. The superiors therefore (backed by the papal authority) had changed their share of the rents payed in kind to a composition or rent in money, which the religious houses did not choose to pay, and had the very good pretence (with the legislature of England) to say, that this backwardness arose from their being unwilling to send any money out of the kingdom. The statute therefore directs, that they shall not for the future send any thing whatsoever to their superiors beyond sea, under whatever name it might be claimed, and as the superiors had likewise made exchanges to the prejudice of the religious houses, in consideration of money paid to themselves, the statute very properly enacts, that every religious house should have a common seal, which should be in the custody of not only the abbot (as before), but joins four others *de dignioribus et discretioribus*, and every grant or exchange, to which this common seal should not be affixed, was for the future to be null and void. It then concludes by declaring, that it is

[q] Du Fresne, in his Glossary, explains the word *apportum* (which is sometimes written *apportatum*) to signify *quicquid apportatur ad sustentationem illius, qui ecclesiæ curam habet*.

not intended to take away any part of the superior's visitatorial power, provided he will come into England in order to exercise it, and that he shall likewise be allowed his reasonable expences for the journey.

The last statute of this reign, entitled, *Ne Rector arbores in Cameterio prosterнат*, is a very short one, but deserves to be taken notice of from the preamble's stating, that trees in a church-yard were originally planted to screen the church from the wind: low as churches were built at this time, the thick foliage of the yew answered this purpose better than any other tree.

Edward the First reigned thirty-four years, during which he summoned nine parliaments. He hath been styled, by Lord Coke, the *English Justinian*; and as he came to the throne at the age of thirty-four, and had no rebellion of consequence, but, on the contrary, added Wales and Scotland to the English dominions, he had leisure, during this uninterrupted course of prosperity to reform the law. The statutes of *Westminster* the first, and *Westminster* the second, together with the Statute of *Wynton*, are proofs of his attention to this most important branch of the duties of a king: and he particularly assumes (with reason) to himself the merit of preventing unnecessary delays by the preamble to the Statute *De conjunctione factis* [r], "*Non est novum, quod nos inter cæteras legum editiones, quas temporibus nostris adinvenimus, celerius apponi decrevimus remedium.*" The Statute of *Quo Warranto*, on the other hand, must not here pass unnoted, and will for ever detract from and affect his character as a legislator.

[r] Made in the thirty-fourth year of his reign.

STATUTUM DE MILITIBUS,

i Edw. II. A. D. 1307.

THERE are but two statutes of this first year of the reign of Edward the Second, the latter of which declares, that it shall not be felony [1] to break prison, unless the crime for which the criminal is committed was a capital offence, which is recited by the statute to have been *otherwise by the common law*, and was therefore a very proper alteration of its severity. As Edward is said, by all Historians and Chroniclers, to have been entirely guided by his favourite Piers Gaveston, I should imagine that this general regulation was covertly [2] meant for his protection. In the early part of this very year, Edward the First had ordered him to quit the realm, previous to which he had probably been committed and escaped from his confinement: no capital offence had, however, been laid to his charge; and therefore if the favourite, whom Edward was now determined to recall, had been prosecuted for breach of prison, this statute became a complete defence upon such a prosecution. Even in the absence of this minion, it should seem that he was chiefly surrounded by foreigners; for the proclamation which issued upon his father's death is in the French language, and, being very short, I shall here insert it from Rymer.

“ Come le tres noble Prince Sire Edward, qui estoit n’ad-
 “ gueres Roy D’Engleterre, soit a Dieu commande, e notre

[1] The *Mirror of Justices*, which is supposed to have been written in this reign, inveighs strongly against making any breach of prison amount to a felony, p. 283.

[2] In the next year, there is an express statute, *Ne quis occasione pro reditu Petri de Gaveston*. The hatred and prosecution of kings favourites was not confined to England at this time; for, in the year 1310, Enguerrand de Marigny, favourite of Phillippe le Bel, was hanged at Paris. *Chronique de France*, par Maitre Gilles.

“ Seigneur

“ Seigneur Sire Edward son fitz et son heire soit ja Roy
 “ D’Engleterre par descent d’heritage ; nous vous mandons
 “ et comandons depär notre dit Seigneur le Roi (qui ore est ;
 “ qui Dieu gard) que sa peze soit tenue et gardee par son
 “ roialme, et tot son poer.” The next record in Rymer,
 after this proclamation, is a most profuse grant to Piers Gaveston of the dutchy of Cornwall, with many other lands and honours, which is dated at Dumfries in Scotland, on the 6th of August, being scarcely a month after the death of Edward the First. These extravagant grants occasioned the only other statute of the present year, which is entitled, *De Militibus*, and which directs, that every one who was of the age of twenty-one, and who had 40*l.* a year in land, should be compelled to take upon himself the order of knighthood. This regulation (which was now converted into a tax) must have originally been established, that the king might know those of his subjects who had considerable estates (for such 40*l.* a year at this time was), and that, upon their becoming knights, he might receive their fealty. It was necessary however, that the person who was required to become a knight [*u*] should, from his age and bodily strength, be able to serve the king in his wars ; and therefore it appears by this statute, that old age, incurable distempers, and other excuses, were allowed : the law however directs those who had such excuses, to repair without delay to Robert de Tiptot and Antony de Beke [*w*], who, upon their paying a proper composition, were to give them a discharge. These

[*u*] The Marca Hispanica mentions two kinds of milites or knights, viz. those who received the honour of knighthood from the sovereign, and likewise others who were obliged to provide *equus cataphracticus*, or a large war-horse : it might not be unreasonable to pay a considerable fine, to get rid of so burthensome and expensive a tenure. Marca Hispanica, p. 260. Another reason for paying this fine, upon becoming a knight, anciently arose, from those who were candidates for this honour, being previously subject in the houses of the Great Barons (who had power, as well as the king, in certain districts to make knights) to many low and menial services, as making the beds, and serving at table ; and from which they were exempted as soon as they became knights. See St. Palay’s dissertations on the ancient Chivalry.

[*x*] There is a record in Rymer, dated the 4th of September at Carlisle, which is entitled, *Pro Antonio Beke de libertate Ecclesiæ Dunelmensis restituta*, from which it appears, that this Antony de Beke was bishop of Durham, and that his temporalities were seized by Edward the First

compositions probably produced as great complaint as those which were made in the time of Henry the Seventh by Empson and Dudley; and though this hath escaped the Historians, might have contributed to the troubles and distresses of Edward, which afterwards ensued.

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DE DIVERSIS LIBERTATIBUS CLERO CONCESSIS,

9 Edw. II. A. D. 1315.

WE have no statutes from the second year of Edward the Second, till the present *Capitularium*, though, if we may credit Thomas de Walsingham [x], many parliamentary regulations were made the preceding year with regard to the price of meat. His words are these : “ Anno “ Domini 1315, velut Deo displicerent *Statuta præcedentis* “ *Parliamenti* (sc. de Carne &c.) omnia solito cariora fuerunt : ” and therefore he informs us, that the present parliament (though this statute is likewise lost, or at least is not printed) applied the only wise remedy to such an increase of price, by enacting, that every one, *viſtuala ſua meliori, pro quo poſſet, venderet ad libitum*.

The present statute consists of sixteen chapters, all of which (agreeable to the title) relate to privileges and immunities claimed by the clergy, which Edward, in his present situation, could not refuse ; though in the earlier part of his reign he was upon so bad terms with this body of men, that the archbishop of Canterbury had excommunicated [y] all those who might contribute to the return of Piers Gaveston. The different parts of this statute seem to contain nothing very particularly deserving notice. I shall therefore only mention, that Prynne [z] seems to have irrefragably proved, in opposition to Sir Edward Coke, that this is no act of parliament ; and amongst other authorities, by a case in the Year Book of Edward the Third, where one of the judges expressly denies its being a statute.

[x] Thomas de Walsingham, p. 107. In further proof of this, there are summonses to parliament in Dugdale for every intermediate year.

[y] Parl. Hist. vol. i.

[z] Records, vol. iii. p. 336, & seq.

THE STATUTE OF SHERIFFS,

9 Edw. II. A. D. 1315.

THE grievance before the present statute is stated by the preamble, which was, that insufficient persons, not having such estates as made them answerable to the king and his subjects, had been appointed to execute this office; it therefore directs, that for the future they should be appointed by the Chancellor, Treasurer, and Barons of the Exchequer. I should conceive that the Chancellor mentioned in this law, is the Chancellor of the Exchequer, and not the Chancellor of England, as it is the natural and grammatical construction of the words. The sheriff at this time frequently farming the king's revenue, it was required that he should be a responsible man, and certain great officers of the revenue, viz. the Chancellor of the Exchequer, the Treasurer, and Barons are named as the proper persons, who are to take care that the sheriff shall answer the king's demands and charges upon him, and it must be remembered that the king's revenue anciently consisted almost entirely of his receipts from the crown lands. There is a very proper injunction at the conclusion of this statute, that the sheriff shall not farm to another the profits of his office, which had (like other farms of the same kind) been productive of great extortion and oppression [a]; and it is likewise enjoined, that all writs shall be executed by bailiffs, who are *known and sworn* to discharge their office faithfully, which part of the statute seems to have escaped the judges assembled in the Exchequer-chamber in Mackallie's Case, which is reported in 9th Cok. 65. and where it seems to have been very material upon the point then before the court.

[a] " Car ceux qui manient les affaires du Roy, ou qui exercent ses droits, ont toujours raison." Soupris de France, part ii.

THE STATUTE OF GAVELET,

10 Edw. II. A. D. 1316.

THERE are some terms made use of in this statute which require an explanation. The word *Gavelet*, or *Gaveletum*, is not to be found in Du Fresne; it however bears a great affinity to the word *Gabellum*, the signification of which is well known; it is generally translated a *tax*, and the Italian word *Gabella* is formed from it.

Spelman gives this account of the signification of this word in the present law; "*Gaveletum juris etiam processus est huic dicatus tenuræ [b], casu quo tenens redditus et servitia ultra modum subducit, quod et Londoniensibus ceditur Stat. Anno 10 Edw. II. de Gaveleto.*" If I may presume, however, to differ from so great an authority, I should conceive that *Gavelet* means no more than *rent*, for the more easy recovery of which within the city of London this statute was made: and this is not very different from the Latin word *Gabellum*, or *Gaveletum*, which generally signifies a *tax*, but may likewise signify any other kind of payment.

There are likewise two other very uncommon words made use of in this law, viz. *sokereuns* and *forseelet*. The first of these is rendered *freemen*, of the propriety of which I have some doubt: the word is plainly of a Saxon origin, but yet I cannot find any explanation of the latter part of it in Somner's Saxon Vocabulary, or in any of the Glossaries. As for the second, viz. *forseelet*, the translation is, by another Saxon word, *forchoke*, which, Blount [c] says, is the same with *forsaken*, or *derelict*; if therefore *forseelet* is synonymous with *forchoken*, it will agree very well with the sense that may be affixed to this word in the present statute, from what precedes and follows.

It hath been observed by some learned writer on the law, that the meaning of the words *inde producit sectam*, is the

[b] Sc. Gavelkind.

[c] In his Law Dictionary.

plaintiff's *producing his witnesses*, which is confirmed by the sense that the word *secta* is used in by the present statute; "Si autem servitia denegaverint, petentes nominabunt statim *suam sectam (scilicet duos testes)*."

There is one very singular provision in this statute, which is, that if the defendant makes default, and does not appear upon the Hustings at London, he shall *lose his land for a year and a day*; after which, on an appearance and payment of costs, he is entitled to an equity of redemption, if the appearance is entered before the year and day expires, otherwise the lands are completely forfeited.

THE

THE STATUTE OF YORK,

12 Edw. II. A. D. 1318.

DUGDALE furnishes us with the summons to this parliament, which informs us likewise at what time of the year it was held,

“ Rex venerabili in Christo Patri eadem gratia Archiepiscopo Cantuariensi salutem. Quia super diversis et arduis negotiis nos et regnum nostrum tangentibus parliamentum nostrum apud Eboracum a die S. Michaelis in tres Septimanas tenere &c. Teste rege apud Nottyngham 25 die Augusti.”

The five first chapters relate to the amendment of the law, as the preamble recites, that many of the ancient statutes wanted *explanation*, and the 3d chapter mentions particularly a statute of the twenty-seventh of Edward the first, which was *not sufficiently clear*. I take notice of this to shew, that the complaint of obscurity in the statute law, is by no means to be confined (as it generally is from the common prejudice in favour of antiquity) to modern acts of parliament. It may, on the other hand, with justice be asserted, that modern statutes are infinitely more perspicuous and intelligible than the ancient ones, of which there cannot be a stronger proof than that there is not perhaps a single statute since the statute of Frauds and Perjuries, and the statute of Distributions in the reign of Charles the Second, which hath required much explanation [d]. It was indeed prophesied by many, that the bill for the alteration of the style [e] would occasion an infinite number of law-suits; but no question arising upon the

[d] There is a common notion in Westminster-Hall, that the statute of Frauds hath not been explained at a less expence than a 100,000 l. It is great injustice to the memory of Lord Chief Justice Hale, to say he was the person who drew it.

[e] It appears by the Philosophical Transactions, that the alteration of the style was proposed so early as the year 1582, by Lord Burleigh: it was afterwards proposed, in 1700, by Dr. Wallis.

construction of this law hath ever been argued in any of the superior courts. The true objection to modern statutes is rather their prolixity, than their want of perspicuity; which prolixity hath in a great measure arisen from the use of printing: when manuscript copies are to be dispersed, the trouble of copying an unnecessary word is considered, but a page or two additional in print neither adds much to trouble or expence. I would not from hence be misunderstood to be an advocate for prolixity: the English law hath this fault perhaps in common with other laws. The oldest conveyance we have any account of, viz. that of the cave of *Machpelah*, from the sons of *Heth* to *Abraham*, hath many unnecessary and redundant words. *And the field of Ephron, which was in Machpelah, which was before Mamre, the field and the cave which was therein, and all the trees that were in the field, that were in all the borders round about, were made sure unto Abraham, &c.* Genesis xxiii. The parcels, in a modern conveyance of 1766, cannot be well more minutely particularized.

There are but two things in the five first chapters which seem to require any particular notice; the first is, that, though we have before heard of *attornies*, a *bailiff* was to all intents and purposes considered as an *attorney*, and might appear for his principal. The second is, that the witnesses to a deed were anciently a necessary part of the jury, which was to try the validity of such an instrument: the party who inclined against the proof, used probably to procure the absence of these witnesses; the statute therefore directs, that, if they do not appear, upon proof of their having been properly summoned, the jury may proceed without them [f].

There is at the end of these regulations, for the amendment of the law, a chapter of a very miscellaneous nature, which, amongst other things, is intended to prevent any officer of a city or borough (who from his office is to regulate the assize of victuals or wine) from dealing, either in gross or retail, in either of these (whilst he continues in office) under

[f] The necessity of these witnesses being formerly part of the jury hath probably occasioned a very troublesome and unnecessary ceremony in the attestation of deeds by two witnesses; this is often attended with great inconvenience.

penalties to be recovered by information, and a third part of which is given to the informer. This seems to be a very proper regulation to prevent what is now called a *job*; but from the statute's being so ancient, and the regulation being inserted in a law (the greatest part of which relates to matter entirely different), I should much suspect that most officers in corporations are ignorant of the penalties which they subject themselves to by the infringement of this statute.

THE STATUTE OF ESSOYNS,

12 Edw. II. A. D. 1318.

THIS statute declares by negatives (and that in many different instances) what Essoyns *shall not be allowed*.

The Essoyn is almost always used for the purpose of delay, and the improper use of it is therefore restrained by many acts of parliament, and the more modern ones generally take it entirely away. Amongst other negative instances it is declared, that it shall not be allowed “*de foemina in servitio domini regis, nisi quia nutrix, aut obstetrix, aut mittatur per breve ad ventrem inspiciendum,*” which words of the statute have been the occasion of a most extraordinary mistake of Sir Edward Coke, in his first Institute [g]. He is there treating of Protections, which are generally used for the same purpose as Essoyns, merely for delay, and consequently are often considered together, and are equally discountenanced by the statute-law [h]. Having entered in his common-place this part of the statute (Essoyns and Protections, making one title or head), he says, that “Protections may be allowed not only to men of age, but likewise within age, and to women, *quia nutrix aut obstetrix*, as necessary attendants upon a camp;” and this most extraordinary position is supported by a marginal reference, in which a record is cited no further explained than by these words, viz. *For the Countess of Warwick*. Now a *nutrix*, or *obstetrix*, might be wanted for the Countess of *Warwick*; though how they could be wanted as *necessary attendants upon an army*, is not easily to be conceived, except it was for an army of *Amazons*; and even *Amazons*, during the season for a campaign, contrived (according to tradition at least) not to require the assistance of a midwife. I think it is not difficult to suggest

[g] First Institute, p. 130. A.

[h] The common clause in all modern acts of parliament: “No Essoyn, Protection, or Wager of law shall be allowed.”

the occasion of a protection, which might be indorsed *pro Comitissa Warwic*. A Countess of Warwick was wife of an Earl of Warwick, who went on some embassy [i]; she was near the time of her delivery, and like all other women in that very critical situation, chose rather to have her own nurse and midwife about her, than to trust to strangers in a foreign country. She therefore solicited a protection *quia profectura*, and included in her suit the *nutrix* and *obstetrix*: the protection was therefore properly indorsed *pro Comitissa Warwic*. It may perhaps be thought that I have dwelt too long upon this mistake of Sir Edward Coke; but the mistakes of so great a man require most particular notice, as they otherwise pass as law under the sanction of such an authority.

[i] It appears by Dugdale's account of Warwickshire, that an Earl of Warwick, with his countess, went on an embassy to France in the seventh year of Henry the Fifth.

O B S E R V A T I O N S
156

STATUTUM DE PRAEROGATIVA REGIS,

17 Edw. II. A. D. 1323.

THE branches of the king's prerogative, which are declared by this statute, almost entirely relate to Wardships and Feudal Tenures. As no part, except the 12th chapter, requires any particular explanation or comment [A], I shall first mention, as the title of the statute leads to it, the following fundamental maxims of the French law, upon which the king's prerogative is founded; which may not only be matter of some curiosity to an Englishman, but by comparison may make him thankful for the noble constitution to which he is happily born. A *Cappadocian* may indeed refuse, from custom and long usage, to exchange a despotic for a more free government; but I can never be persuaded but that there is a necessary connexion between slavery and misery, and between freedom and happiness. I do not mean however to condemn all the prerogatives given to the king by the French law, as some of them are equally vested in the crown by the law of England, and that for the most salutary purposes to the subject.

“ Le roy ne tient que de Dieu, et son Espee.

“ Si veut le roy, si veut la loi.

“ Toutes les personnes de son royaume lui sont sujettes.

“ Au roy seul appartient de lever les tributs, de faire la guerre et la paix.

“ Le roy est le principe et le terme des toutes les justices.

“ Le roy seul peut accorder graces et remissions [I].”

I have before said that the 12th chapter requires a comment;

[A] It is hardly necessary to mention, that Staunford, the author of the treatise on the Pleas of the Crown, hath written a Comment on this statute.

[I] Duck likewise, in his excellent treatise *De auctoritate juris civilis*, gives us this account of how far the intervention of the French parliaments is necessary in giving the full authority to the king's *arrets* or edicts.

“ Rex Galliae edictis suis semper subjungit (*tel est notre plaisir*); sola vero in illis “ approbatio et consensus requiritur parliamentorum, ne quid contra utimatem “ regni sit, aut jus tertii laedat.”

it is thus worded: "Item habet rex escaetas de terris Normannorum, de cuiuscunque feodo fuerunt, salvo servitio quod pertinet ad capitales Dominos Feodi illius, et hoc similiter intelligendum est si aliqua hæreditas descendat alicui nato in partibus transmarinis, cujus antecessores fuerint ad fidem regis Franciæ, ut tempore regis Johannis, et non ad fidem regis Angliæ," &c. Prynne cites a passage from Matthew Paris, which throws great light upon this chapter of the law, which I shall here transcribe from him, together with his observations upon it [m].

[m] 'Matthew Paris gives us this account of the king's seizing the lands of Normans in England:

"Circa dierum illorum curricula, rex Francorum Parisiis convocatos omnes ultramarinos, qui terras habuerunt in Anglia, sic est affatus. Quicumque in regno meo conversatur habens terras in Anglia, cum nequeat quis competenter duobus dominis servire, vel penitus mihi, vel regi Angliæ inseparabiliter adhæreat. Unde aliqui terras et redditus habentes in Anglia, eas relinquentes, possessionibus, quas habeant in Francia, adhæserunt; aliqui e converso. Super quo certificatus rex Angliæ, omnes de regno Franciæ, præcipue Normannos, iussit terris suis, quas in Anglia habuerunt, disseisiri. Unde regi Francorum videbatur, quod rex Anglorum (qui non in adoptionem, eorum statuit conditio, nem terris hinc vel inde suis privandorum, ut ad alterutrum regnum transmigrarent libere, sicut et ipse rex Francorum fecerat), treugas initas inter eos confregisset. Sed quia nimis corpore debilitatus post reditum suum de Pictavia fuerat, noluit certamina fuscitare, imo potius dissimulando pertransire, et impetuosas Normannorum querelas, et insurgendi in regem Anglorum proterviam et avidam voluntatem, reprimere satagebat."

This record and passage of Matthew Paris will very well explain the Statute *De Prærogativa Regis*, Ann. 12 Edw. II. c. xii. and Staunford's Gloss thereon, *Placita Corone*, lib. iii. c. 36. compared with Bracton, lib. ii. c. 35. sect. 12. 15. and lib. v. *De exceptionibus*. c. 24. sect. 1. fol. 427. "Est etiam et alia exceptio quæ tenenti competit ex persona petentis propter defectum nationis, quæ dilatoria est et non perimit actionem, ut si quis Alienigena, qui fuerit ad fidem regis Angliæ, tali non respondeatur, saltem donec terræ fuerint communes, nec etiam si rex ei concesserit placitare, quia sicut Anglicus non auditur in placitando aliquem de terris et tenementis in Francia, ita nec debet Francigena et Alienigena qui fuerit ad fidem regis Franciæ, audiri placitando in Anglia. Sed tamen sunt aliqui Francigenæ in Francia, qui sunt ad fidem utriusque, et semper fuerunt ante Normanniam deperditam et post, et qui placitant hic et ibi, ea ratione quia sunt ad fidem utriusque, sicut fuit W. Comes Marr. manens in Anglia, et M. de Feynes manens in Francia, et alii plures. Et ita tamen si contingat guerram moveri inter reges, remaneat personaliter quilibet eorum cum eo cui fecerit ligeantiam, et faciat servitium debitum ei cum quo non steterit in persona." And c. 25. sect. 3. "Item respondere poterit, quia particeps de quo dicitur nihil capere potest, quia est ad fidem regis Franciæ, et nihil capere poterit antequam fiat fides regi Angliæ, et cum terræ sint communes et concordēs." Prynne, vol. ii, p. 631. See also Lord Bacon's Works, vol. ii. p. 536. who says, "that this part of the statute shews that, before the time of King John, there was no colour for any escheat, because the inhabitants of Normandy were the king's subjects in possession."

The 13th chapter declares the king's prerogative in claiming wreck of the sea, and also whales [n] and sturgeons as royal fish; ancient records however distribute these royal fish in a more particular manner, by giving the head to the king, and the tail to the queen [o]. The Statute-book is entirely silent with regard to the rights of a queen of England; on the contrary, she is most particularly and anxiously provided for by the laws of Hoel Dda, and one of the highest penalties in the whole code, is for killing her cat. There is a very ancient tax in France for providing the queen with pins; from whence the term of *Pin-money* hath been undoubtedly applied by us to that provision for married women, with which the husband is not to interfere.

[n] There is a record in Rymer of the first year of Edward the Third, in which he claims this same right in the province of Gascony: amber and lime-stones, thrown up by the Baltick, are enumerated as *Fura Regalia*, by the king of Prussia, in his *Code Frederique*; and in a natural history of amber, published in 1699, and written by a Prussian, one of the chapters is, *De lucro fisci ex rudi succino*.

[o] *Honor de Richmond*, p. 91. The 17 Edw. III. ch. vi. barely mentions *le cor la Reine*, or as it is more commonly called *Aurum Regina*. Prynne hath written an express treatise in Quarto on this tax: it is not extraordinary that it should produce nothing, as it was the tenth part of what was voluntarily paid into the Exchequer. There is a record in Rymer of 8 Rich. II. *De auro Regina in Hibernia colligendo*, which proves that this was an ancient right, which took place not only in England, but in any newly-acquired dominions.

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MODUS FACIENDI HOMAGIUM ET FIDELITATEM,

17 Edw. II. A. D. 1324.

THIS is most clearly no statute, but only an entry made in the *common-place* of some lawyer, of the different methods of a freeman's paying homage and fealty to his lord, and that of a villein. The form of rendering homage agrees word for word with the form in Littleton's Tenures, in his chapter of Homage. The difference between the *freeman*, and the *villein's* oath consists in this, that the freeman swears, "qu'il devindra votre homme de ceo jour en avant de vie, et de membre, et de terren honor." The villein swears, "que jeo vous serray foial, et loial, et que jeo vous serray justiciable du corps et de chateux."

Both the ceremonies agree in this, that the person swearing fealty is to hold his hands joined together [p], between the hands of his lord; the reason of which seems to have been, that some lord had been assassinated under pretence of paying homage; but while the tenant's hands continue in this attitude, it was impossible for him to make such an attempt. I take the same reason to have occasioned the ceremony still adhered to by the scholars in Queen's College at Oxford, who wait upon the fellows placing their two thumbs upon the table: and I have heard that the same ceremony is used in some parts of Germany, whilst the superior drinks the health of the inferior. The inferior, during this, places his two thumbs on the table, and therefore is incapacitated

[p] Many old tomb-stones represent the hands of the dead person joined in this manner together; the conceit of which probably was, that he *was paying homage* to God. "L'ancien vassal ne doit au nouveau seigneur que la bouche, et les mains." Coutumes de Vermandois, tom. ii. p. 101.

from making any attempt upon the life of the person who is drinking. The suspicion that men formerly had of such attempts upon their lives upon such occasions, is well known from the common account with regard to the origin of pledging.

THE first account of the origin of pledging is given by a writer in the 17th century, who says that it was first used by the soldiers of a German army, who were sent to the siege of a town, and that a soldier of the town was sent to the camp to see what was going on. The soldier of the camp was told that the soldier of the town was a spy, and that he was to be hanged. The soldier of the camp was told that the soldier of the town was a spy, and that he was to be hanged. The soldier of the camp was told that the soldier of the town was a spy, and that he was to be hanged.

THE second account of the origin of pledging is given by a writer in the 18th century, who says that it was first used by the soldiers of a German army, who were sent to the siege of a town, and that a soldier of the town was sent to the camp to see what was going on. The soldier of the camp was told that the soldier of the town was a spy, and that he was to be hanged. The soldier of the camp was told that the soldier of the town was a spy, and that he was to be hanged. The soldier of the camp was told that the soldier of the town was a spy, and that he was to be hanged.

THE third account of the origin of pledging is given by a writer in the 19th century, who says that it was first used by the soldiers of a German army, who were sent to the siege of a town, and that a soldier of the town was sent to the camp to see what was going on. The soldier of the camp was told that the soldier of the town was a spy, and that he was to be hanged. The soldier of the camp was told that the soldier of the town was a spy, and that he was to be hanged.

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THE STATUTE FOR VIEW OF FRANK- PLEDGE;

17 Edw. II. A. D. 1325.

THIS supposed statute likewise seems to have been taken, as well as the preceding one, from the notes or common-place of some lawyer, who had occasion to hold a court of Frank-pledge: this is manifestly so from the first period, "*Primes vous nous direz per le serement que vous nous avez fait, si tous les suitours qui deuvent suite a cest court, soient venuz come venir deuvent et queux ne sont mie.*"

There are two or three things in this statute however which deserve notice. The first is the translation of the third section, which runs thus: "And if *all the dozeins* be in the assise of our Lord the king;" which, I believe, is scarcely intelligible to the reader; the original French however explains it to mean all those who were twelve years of age, and who were obliged to appear at the leet before the statute, which dispensed with that attendance. By the 21st section, mention is made of an inquiry with regard to rapes before the coroner, which I do not recollect to have read or met with elsewhere. By the 31st section, one of the articles of inquiry is "*s'il ny eit null femme putaine per quoi le seigneur purra perdre.*" This part of the 31st section is not translated, and I must own I do not conceive what the particular loss to the lord must have been from the harbouring such a woman within his jurisdiction. The 33d section makes mention of the punishing those who take pigeons in the winter, which proves that they never could have been considered (according to some writers on the law) as a nuisance, and that the keeping them was indictable in the leet [9]; the contrary of which is most expressly declared. The

[9] The old French law dwells much upon the lord's right with regard to pigeons.

supposed nuisance from pigeons is their eating up the seed-corn after it is sown; it hath of late been discovered however, that, like most other animals who are persecuted for supposed mischief, they are of singular use in eating the seeds of weeds, as also the eggs of noxious insects, and the insects themselves. I could wish that a proper fable was added to the common collection, to impress an early sense of tenderness in children to animals of all kinds; their barbarity is often excused under pretence of destroying what does harm.

I have now made some observations upon almost every statute of this reign. That Edward was a weak prince [r] is unanimously agreed by all writers and historians; yet the clamour against his government seems chiefly to have arisen from his having put too unlimited a confidence in favourites, and those favourites foreigners. The barons who deposed this unhappy king were certainly guilty of greater breaches of the law, than those whom they opposed; witness their murder of Piers Gaveston, which they were obliged to procure an indemnification for by the statute of *Ne quis occasione tur pro morte Petri de Gaveston*. Upon the whole (to consider Edward the Second as a legislator), though it cannot be said that any law passed during his reign of great importance to the subject, yet he seems to have had the negative merit of never having attempted to introduce any statute, which in any measure tended to derogate from their just rights and liberties.

After the eighteenth of Edward the Second, follow some statutes *incerti temporis*; no editor having been able to say

pigeons. Thus, in the Institutes Coutumieres, it is laid down, "que nul ne peut, batir colombe a pied, sans conge de son seigneur." The lord had likewise a right to the young pigeons of his vassal, except in the march-slight. Coutumes de Rheims, p. 125.

[r] He was a scholar, if the verses printed in Fabian's Chronicle are really of his composition, and which Fabian supposes to have been written during his confinement: I do not from this pretend to say that he had a poetical genius.

"Dammum mihi contulit, tempore brumali,
 "Fortuna satis aspera, vehementis mali.
 "Nullus est tam sapiens, mitis, aut formosus,
 "Tam prudens virtutibus, ceterisque famosus,
 "Quin stultus reputabitur, et satis despectus,
 "Si fortuna prosperos avertat effectus."

with

with precision, whether they belong to the reigns of Henry the Third, Edward the First, or Edward the Second; and I should apprehend, that the number of these *Uncertain Statutes* (if I may so call them) should be much larger.

The first of them is entitled, *An Ordinance for Bakers, Brewers, and other Victuallers, and for Bells, Busbels, and Forestallers*. The baker and the miller (as before observed on the statute of *Pillory*) are the first objects of the parliamentary regulations, and, in case of deceits, they are to be punished by the pillory, which it should seem in those times was not constructed as a pillory is at present. The words of the statute are: "*Quod pilloria sive collistrigium habeatur debite fortitudinis, ita quod contra delinquentes exequi possit iudicium, sine corporum periculo.*" From which it may be inferred, that the criminal was suspended in the air by the *collistrigium*, or stretch-neck, in the same manner that children are sometimes put into swings, in order to stretch their necks and make them grow: the ridicule attending the delinquent, in this suspended situation, must have been infinitely greater than when he stands upon a floor. I have already ventured to inveigh against the impropriety of this kind [.] of punishment.

The direction with regard to a miller's toll seems to be very vague and uncertain, as it is to be regulated, "*secundum fortitudinem cursus aquæ,*" which would puzzle a *Smeaton* of the present times to estimate with accuracy; and I am afraid was infinitely beyond the natural philosophers and civil engineers of those reigns. Less is to be found with regard to mills in the law of England, than perhaps the law of any other European country: it makes, on the other hand, one of the principal heads of the law of Scotland; as likewise of the Northern countries of Europe. The reason of this seems to be, that the inhabitants within a certain district are obliged, by the laws of other countries, to grind at the lord's mill, and at no other, of which there are some traces

[.] There are some very sensible observations to the same purport in the Preface to the *State Trials*. The author of that Preface signs only the initial letters of his name, *M. N.* It is much to be wished however, that the public was informed to whom they owe those reflexions, and many others contained in that Preface.

in our ancient law ; but this service was by no means general, and hath at last been almost universally dropt, from the great difficulty there is to enforce such a right.

The butcher and the cook are next made subject to penalties : the butcher, if he sells “ *carnes porcinas supersennatas, vel carnes mortuas de morina.*” The word *supersennatas* is translated *meazled pork*, or, as it is more generally termed, *measly pork* ; the etymology of which expression, I conjecture to be from the French word (*mesle*), or (*mingled*), as the flesh of a swine, when said to be *measly* or, *meazled*, is interspersed with white streaks or spots. I should doubt much however of the propriety of this translation in the common editions of the statutes. I cannot in any of the Glossaries find the word *supersennatus* ; the meaning of it however seems to be very obvious, and to signify *unsound meat* ; but there seems to be no foundation for confining it to that particular distemper in a hog, which makes the flesh appear meazled. It may be perhaps thought unnecessary to have dwelt so long upon the meaning of this word ; but if a butcher was to be prosecuted upon this branch of the statute, the meaning of the word must be settled with precision, otherwise it would be impossible to convict.

The butcher and cook, for the first offence, is to be heavily amerced ; for the second, he is to be set in the pillory ; for the third, he is to be imprisoned ; and for the fourth, he is to leave and abjure the village or town in which the offence is committed ; and which I the rather take notice of, as it seems to be the only instance in our law of punishing by a banishment from a particular place, or district [1].

This statute concludes with most terrible denunciations against forestallers, which as they are more florid and rhetorical than most part of the statute law (except perhaps the preamble to a statute of the last year of Edward the First, which I have already taken notice of) it may not be improper here to insert as a specimen of the legislative rhetoric of this

[1] As for the common abjuring by criminals, that is a banishment from the land.

country. "Præcipue ex parte Domini Regis præcipitur, quod nullus *forestallarius* patiatur in villa commorari, qui pauperum depressor est manifeste, et totius communitatis, et patrie publicus inimicus; qui bladum, pisces, allec, vel res quascunque venales, per terram vel per aquam venientes, obviando præ ceteris festinant, *lucrum sitientes victiosum, pauperes opprimentes*, et divitiores decipientes," &c. I have already had occasion to express my sentiments with regard to the laws against forestallers and regraters, and should almost wish that they were expunged from the statute-book, as the consequence of putting them in force must for ever be to raise the price of provisions.

But I cannot however say in what this is applied to the subject-matter of the statute, which relates to no particular system or provision with regard to Commerce. Let me avow, and I shall always think it right in this case, never not to be without a difficulty which I am not able to explain, but which may perhaps receive an explanation from others.

The following passage in the Court's opinion is certainly not
 correct: "The act empowers the respondent to be
 appointed as a judge of the court, which is the more
 especially so, as we have no translation of this law
 available to consult." The word "empowers" is used by the Court to be interpreted
 with the following word, "and the words 'empowers' to
 changed to 'appoints' and the words 'respondent' to
 it will run thus: "The act empowers the respondent to
 be appointed as a judge of the court, and the meaning will
 be that the respondent is to be appointed as a judge of the court."

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STATUTUM QUOD VOCATUR DE
RAGMAN,
INCERTI TEMPORIS.

I HAVE somewhere met with an interpretation of the word *Ragman*, used in the title of this statute, but cannot recollect in what author. Du Fresne cites the old Chronicles to prove, that it signifies the same with the word *Charta*, or *Litteræ patentes*. I cannot however see in what this is applicable to the subject-matter of the statute, which relates to no particular grievance or provision with regard to *Charters*, or *Letters patent*; and I shall always think it right in this comment not to pass unnoted a difficulty which I am not able to explain, but which may perhaps receive an explanation from others [u].

The following passage in this short statute is certainly misprinted: "Que nul enquerelant, ne respoignent, ne soit empris par hokettes ne per barettes;" which it is the more necessary to correct, as we have no translation of this law. The word *hokettes* is said, by Du Fresne, to be synonymous with the following word *barettes*: the word *empiris* being changed to *surpris*, and the words *ne respoignent* to *respondant*, it will run thus: "Que nel enquerelent, ne respondent, soit surpris par hokettez ne per barettes;" and the meaning will be, that no plaintiff or defendant shall be surprized in his

[u] Since the former edition, I have happened to meet with a record in Rymer of the first year of Henry the Fourth, which is entitled, *De raggemanis comburendis*, and which explains this word to have signified blank recognisances, which persons, threatned with prosecutions, had entered into, and deposited in the Chancery, during the preceding reign. Hence a (perhaps whimsical) conjecture arises with regard to the etymology of the word *Ragman*. He who had signed such a blank recognizance was absolutely in the king's power, and might therefore (if the penalty or fine inserted was considerable) be looked upon as utterly ruined in his circumstances, and in *rags*. The record from Rymer likewise proves, that this Statute *Incerti Temporis* was probably a statute of the first of Henry the Fourth, though it is still difficult to account why these *Ragmans* are only mentioned in the title, and not in the body of the act.

cause by the tricks of a barretor [w]. In these alterations I have not deviated much from the original text, and the sense and context most clearly require such an alteration. It must be remembred, that the present statute hath not been translated, and therefore, seldom, if ever, enforced: mistake follows mistake consequently in the repeated editions of such laws; scarce any one ever peruses them with attention, not even the editor, as he is not checked by a marginal translation. I have had thoughts of translating these statutes from the old and barbarous French, in which they are enacted; and the having read with attention all the ancient statutes in the original, would enable me to form the best Glossary for such a work: I have however been deterred from this by the old Greek adage, of *μὴ ἀπιστοῦν, μὴ ἀκακῶν*.

[w] The word *barat* is rendered, in the Glossary to the Life of St. Lewis, by *fraude, perfidie*.

relates to law, and therefore it should be read *barat* (viz. a law), and not *barat*, signifying *fraud*, and this is the more clear from the other use, which precedes it, viz. *barat*, and neither of them are to be considered as *barat*, but as *barat*, which is not very commonly to be found in our ancient laws or records. It is generally used by those who have translated the old laws of Norway, Sweden, and Denmark, into Latin, as *synonymus* with *barat* or *barat*, and is a contraction of the word *barat*, becoming from *barat* *barat* and *barat*, by the known rule in etymology, viz. *barat* *barat*.

By the *barat*, if any of the laws of the French are found dead, or wounded, it is humbly desired, that they be restored to the state of *barat*. We hear little of the *barat* in our Histories or Chronicles, and this perhaps

CONSUETUDINES ET ASSISA FORESTÆ,

INCERTI TEMPORIS.

THERE are two or three things, rather relative to the words made use of in this statute than the subject-matter or provisions of it, which may possibly deserve some notice. The learned Mr. Cay, in his Preface to the Abridgement of the Statutes, hath observed a most palpable mistake in the following clause: “*Ut memorialiter habeatur quid sit viride, sciendum est quod omnes arbores fructum portantes, et etiam hæ quæ tenent viridem per totum annum, et fraxinus, si antiquitus usus fuerit in traforestam, et arabilis, quæ Dominus Rex est in sesina.*” The whole of this explanation, of what shall be deemed *vert* in the forest, most clearly relates to *trees*, and therefore it should be read *erabilis* (viz. a *maple-tree*), and not *arabilis*, signifying *arable land*; and this is the more clear from the other tree which precedes it, viz. *fraxinus*, or an *ash*, and neither of them are to be considered as *vert*, nisi antiquitus usus fuerit.

The word *bercator* is used in the next chapter, which is not very commonly to be found in our ancient laws or records. It is generally used, by those who have translated the old laws of Norway, Sweden, and Denmark, into Latin, as synonymous with *pastor* or *shepherd*, and is a contraction of the word *vervicator* [x] becoming from thence *lerbicator* and *bercator*, by the known rule in etymologies of “*literæ ejusdem organi sæpissime mutantur* [y].

By the 4th chapter, if any of the deer of the forest are found dead, or wounded, it is humanely directed, that they shall be sent to the next house of *Lepers*. We hear little of the leprosy in our Histories or Chronicles, and this is perhaps

[x] From *vervex*, an *eye*.

[y] Thus the name *Jovianus*, in Greek, becomes *Ιοβιανός*; as also *Θαύριος*, becomes *Ουλαβιανός*.

the only instance of its being mentioned in any law [z]; though there are several of the ancient Scotch statutes which relate to it. Hentzner indeed, who was in England during the reign of Q. Elizabeth (and perhaps the first travelling tutor to a young nobleman in the tour of Europe) says that the English were at that time much subject to the leprosy. I should doubt much whether this supposed leprosy was more than the scurvy; and if we ever had this horrible distemper amongst us, it is not impossible that greater cleanliness by change of linen, as also the use of tea, having abolished the more solid and substantial breakfast of meat, may have much abated its rigour. After all, perhaps, the leprosy here alluded to by the statute, may not be the *elephantiasis*, but only a kind of *itch*, which the inhabitants of poor and mountainous countries are subject to from a poverty of blood, occasioned by poverty of diet. I submit this however, with great diffidence, as I am sensible of the impropriety in *alienas segetes falcem inferere*.

[z] There is a Writ, however, in the Register, *De leproso amovendo*. Ulloa mentions (in his voyage to South America) that this terrible disease hath within these thirty years made its appearance at Carthagena; and Peysonel (in the Philosophical Transactions) takes notice that it hath extended its infection to Gaudalupe, and supposes it originally was brought from the coast of Africa, by the Negroes.

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the only instance of its being mentioned in any law [a]; though there are several of the ancient Scotch statutes which

STATUTUM ARMORUM AD TORNIAMENTA,

the reign of O. Elizabeth (and perhaps the first travelling tour to a foreign nation in the time of Henry) say that the English were at that time much subject to the reproach.

INCERTI TEMPORIS.

THIS statute may very well merit the attention of the herald, or the reader of ancient Romances [a], as there are a great many terms used in it which relate to chivalry and armour. The chief intent in the legislature by this law seems to have been to restrain the great numbers, by which the Knights were attended at these expensive and strange festivals. From the inconvenience and riots occasioned by them, we find many proclamations in Rymer, to forbid the use of them in particular places, and the lands of those who justed, or *bordearunt* [b], according to the Latin term, were seized into the king's hands, for acting contrary to these proclamations [c]. A judicious collection of the Royal Proclamations from Rymer and others, in a regular series of time, would not be without its use, and would throw light upon many points of the ancient law.

[a] There is a very fine collection of ancient French Romances in the Museum; and the manuscripts are very fair, and finely illuminated. It appears likewise by Monsieur de St. Palay's dissertations on the ancient Chivalry, that there is a very large collection of the same kind in the French king's library. If the remark may not be thought too presumptuous in an English man, this ingenious author seems often to mistake the sense of the words in these old French writers, as well as the Provençal poets, which he cites.

[b] This word seems to be derived from *borda*, a club.

[c] Henry the Second of France being killed by accident in jousting at one of these Tournaments, was probably the occasion of their being after this totally disused; the introduction of fire-arms must likewise have contributed to these military amusements and pageantry being laid aside.

STATUTUM DE JUDAISMO, INCERTI TEMPORIS.

PRYNNE [d] fixes the time of this statute to the fourth year of Edward the First, contrary to the opinion of Sir Edward Coke, who supposes it to be a law of the eighteenth year of that king's reign. It contains some curious particulars with regard to the terms upon which the Jews were then tolerated in this country. By the second section, the *good Christians* are not to take *above half* their substance. By the fourth section, a Jew, when above seven years of age, is to wear a particular mark (*of two cables joined*) upon his upper garment; the same section declares, "quils sont les *serfs* du "roy," and by the eighth, no Christian is to be permitted to lye in their houses [e]. Notwithstanding these severities, a Jew is permitted, by the last chapter of the law, to purchase an house and curtilage (or close adjoining), which an enlightened parliament of the eighteenth century would not permit some few years ago.

D'Blossiers Tovey published a treatise in Quarto, in 1738, upon the antiquities which relate to the Jews in England, in which there are some extracts from the Chronicles which deserve notice; it is by no means however so complete, as a collection of this kind might have been made. When this persecuted people were most favoured, their condition was intolerable; and all that can be said by way of justification for our ancestors is, that they were rather more indulged in privileges in this country, than in most other countries of Europe. The first laws which relate to this unhappy people, are those of the reign of Henry the Second, to be found at the end of Wilkins's Anglo-Saxon Laws [f]. They were

[d] Collection of Records, vol. lili. p. 153.

[e] "C'est la même chose de coucher avec un Juif, que de coucher avec un chien; et ce sont nos pères." Voltaire in speaking of the persecution of the Jews, and the severe laws against them.

[f] P. 147.

much oppressed likewise in the reign of Henry the Third, as appears in the Appendix to the second volume of Prynne's Records. Howel [g] tells us this story of what happened to a Jew in the reign of Henry the Third [b]. He had by accident fallen into a privy on his Sabbath, being a *Saturday*, and would not suffer any one to take him out, though *rather a necessary work*. Common humanity should not have permitted this obstinate adherence to a religious ceremony; however, the earl of Gloucester not only suffered him to continue in this filthy condition his own Sabbath (being *Saturday*), but would not permit any one to take him out on the *Sunday*, being *the Sabbath of Christians*: the Jew, by this cruel joke, was suffocated; nor do the Chroniclers of the time reflect upon the barbarity of it. We cannot however be much surprized at this, as, some centuries afterwards, Sir Edward Coke mentions a great number of Jews, who were persuaded by the master of a ship to take a walk upon the sands whilst the tide was coming in (which he represented to ebb), and, by this most horrid deceit, were surrounded by the sea and drowned. The reflexion which Sir Edward Coke makes upon this is only, "Thus perished these *infidel* Jews." The compiler of the Annals of Waverley speaks much in the same manner of a general massacre of this people, "*Judæos occidentes, et bona eorum diripientes, et per omnia benedictus sit Deus qui tradidit impios* [i]."

It must be said however to the honour of Thomas Wykes, who is perhaps the best writer amongst the old Chroniclers, that he expresses himself with proper humanity, after having mentioned a persecution of the Jews by Edward the First, "*Anno 1263, Londonenses, non zelo legis, sed cupiditate lucri allecti, Judæos crudelissime trucidabant, nec sexui nec ætati parcentes, et licet non sint Christiani inhumanum et impium videtur eos trucidare sine causa* [k]."

[g] In his *Londinopolis*.

[b] A rich Jew not ransoming himself, King John ordered, for seven days successively, one of his great teeth to be pulled out; upon which he at last submitted to pay the king 10,000 marks of silver. Stow's Chronicle, p. 168.

[i] Gale's Coll. vol. iii. p. 163.

[k] Gale, vol. iii. p. 59. Thomas de Wykes was a canon of Osney.

Notwith

Notwithstanding this most shocking barbarity, and a continued series of massacres of this defenceless people, the kings of England occasionally shewed them protection; but this was like the protection of the kings of Denmark to the city of Hamburgh, the motive for which hath been to let the sponge fill for a time, that they may afterwards squeeze the more out of it. Voltaire supposes these persecutions to have been caused by the great decrease of money in Europe by the Crusades, which was falsely attributed to the Jews engrossing it [1]. Possibly this might contribute amongst other reasons; but the prejudices against this most extraordinary and singular sect of religion, was sufficient in times of ignorance to have occasioned the miseries which they endured, and which they still, in some measure, suffer in different parts of Europe [m]. These prejudices being so strong, it is certainly humane in the English law to allow them a trial *per medietatem linguæ* [n]; which Selden informs us, they had a right to claim by the ancient law. This indeed is not the modern practice, and it is to be hoped, that religious prejudices and heats will never make it necessary.

Those who may have a desire to see more particulars with regard to the Jews, in the twelfth and thirteenth century, may consult Annal. Monast. Burt. in the first volume of Gale's Coll. p. 338. Script. post Bedam, p. 744. and the 7th chapter of Madox's History of the Exchequer.

[1] One of the causes of the persecution of the Jews arose from a notion, that they killed the children of Christians in order to use their blood in medicine. Gower (in his 2d Book *De confessione amantis*) says, that this was prescribed to Constantine for the cure of his leprosy, but that he refused to try the medicine, and for that piety was miraculously healed:

“ They would him bath in childe bloode,
 “ Within seven winter's age,
 “ For as thei sayen, that shulde assuage
 “ The lepre F. 45. B.

[m] Gemelli (the famous traveller, who was at the siege of Fuda, in 1686, says, that the Jews, who were found in the town, were immediately sold by the Imperial army as slaves.

[n] Our ancestors, it is true, could persecute the Jews; but they would not persecute them by the mockery of a trial, consisting of judges who were prejudiced.

[174]

ARTICULI ET SACRAMENTA MINISTRORUM REGIS IN ITINERE JUSTICIARIORUM. INCERTI TEMPORIS.

THIS statute consists chiefly of the oaths to be taken by those officers who are obliged to attend the king's justices in Eyre, particularly the sheriff, under-sheriff, and bailiffs. As the county towns are necessarily crowded upon these occasions, it directs, that no fairs shall be held during the assises [a], "*sed quod comitatus teneatur solummodo ad profros faci- endos.*" The word *profros* is a very uncommon one, but signifies the same with the plaintiff's suit: this is the sense of the French word *profre* in Britton, which answers to the *produit se*, "*Jehan de Hayes se profre verse Thomas de Bruce [p].*" The next regulation is, that no one shall take up or hire an inn during the Eyre, "*sed venientibus gratis concedatur.*" which regulation, if it was to take place in these days, towns would not be so solicitous to have the assises.

[a] By a preceding statute (*incerti temporis*) it appears, that there were at this time only four circuits; they were thus divided, York, Northumberland, Westmoreland, Lancaster, Nottingham, and Derby — Lincolnshire, Warwickshire, Leicestershire, Staffordshire, Northamptonshire, Rutlandshire, Gloucestershire, Herefordshire, Worcestershire — Cornwall; Devonshire, Somersetshire, Dorsetshire, Wiltshire, Southamptonshire, Oxen, Berkshire, Sussex, and Surrey — Kent, Essex, Hertford, Norfolk, Suffolk, Cambridgeshire, Huntingdon, Bedford, and Bucks. It appears by Ames's History of Printing, that before the statute of Henry the Eighth, which annexes Cheshire to the Welsh circuit for the counties of Denbigh, Flint, and Montgomery, Cheshire was frequently added to the Northern circuit.

[p] Britt. p. 41.

DE MAGNIS ASSISIS ET DUELLIS,

INCERTI TEMPORIS.

THIS statute regulates the different actions in which the trial by battle, or by the grand assise, is to take place. The statute is very short, and contains nothing very particular, except that there should be such minute and anxious regulations about so absurd and impious a method of decision. The last trial by battle in England was in the time of Charles the First, and that did not end in the actual combat. It is amazing, that it should have continued so long in so many different parts of Europe; and the reason for the tolerating of it seems to have been, that the lords in most districts had the appointment of the judge, who, either himself or his lord, was interested in favour of one of the parties litigant: this might perhaps drive the other party, who suspected this prejudice against him, to appeal to this chance by combat. There is a story in Grafton's Chronicle [9], which must have likewise made this tryal infinitely ridiculous. A citizen of London (in the time of Henry the Sixth) was of a strong make, but of a faint heart; he happened to be obliged by this kind of tryal to enter the lists against an antagonist, who was both weak and puny: the friends of the citizen, to give him better spirits, dosed him with wine and *aqua vita*, so that he was very drunk when he began to engage, and fell an easy prey to his adversary.

Montesquieu [r] hath deduced the affront given by the lye from this trial, as when the defendant denied the plaintiff's allegation, the consequence was the trial by duel. Is

[9] P. 150.
[r] In his *Esprit des Loix*.

it necessary however to have recourse to reasons derived from ancient customs and practices, to shew that the lye given must raise the warmest resentment and anger in a person of liberal education and disposition [1] ?

[1] See more with regard to this trial by battle, and the disuse of it hereafter.

STATUTES

STATUTES MADE AT NORTHAMPTON,

2 Edw. III. A. D. 1328.

THESE statutes made at Northampton consist of seventeen different chapters. They are preceded by other *Capitularia* of the first year of the reign of Edward the Third; and, taken together, shew the very great confusion in which the kingdom was involved during the reign of Edward the Second. As the statutes however become more modern, they become more clear and intelligible, and likewise generally relate to what hath before been observed upon. I have therefore left them to speak for themselves, and shall never obtrude any remark which does not seem to be necessary for the illustration of the law under consideration, and which likewise bears an immediate relation to it.

The 2d chapter regulates in what cases pardons shall be granted, and confines them to those instances only where the king is obliged to pardon by his oath, "*cest a scavoir, ou home tue autre soi defendant, ou en cas fortuit.*" On such an accident (for I cannot call it a crime, which always necessarily implies a bad intention in the perpetrator) the king was obliged, says the statute, to grant a pardon by his oath, meaning undoubtedly his coronation oath [1], in which he swears to *administer justice in mercy*. I have already observed, that this power of pardoning was abused by the kings of England and other countries [u].

I should

[1] The coronation oath of the kings of England, in the time of Henry the Third, appears by Bracton to have been the following: *Debet enim in coronatione sua in nomine Jesu Christi prestitum sacramento, hæc tria promittere populo sibi subdito. Imprimis, se esse præcepturum, et pro viribus opem impensurum, ut ecclesie Dei, et omni populo Christiano, vera pax omni tempore servetur. Secundo, ut rapacitates omnes et iniquitates interdicat. Tertio, ut in omnibus judiciis æquitatem præcipiat, et misericordiam.* Bracton, lib. iii. ch. ix. I have the rather here inserted this form of the coronation oath, as it seems to imply an obligation not only to preserve the peace at home, but that a king shall not wantonly molest the peace of other nations; which is a duty that cannot be made binding by two many ties.

[u] There is a very singular law of the ancient Goths, whilst in Spain, against

I should imagine however, from these repeated complaints with regard to pardons, that it was not only the abuse by the crown which occasioned the clamour against them, but the consequences in point of interest to the barons. Most of them had very extensive jurisdictions and grants of forfeitures, of which they were deprived by the king's pardoning offences, *et hinc illæ lacrymæ.*

any one's soliciting the king for a pardon, but he may grant it, however, of his own accord. *Fuero Jusgo*, lib. vi. p. 320. This law is the more extraordinary, as the king is frequently enjoined by those laws to *exercise justice with mercy*; and without a solicitation he cannot very well hear of the circumstances which should incline him to shew such mercy. By the *Fuero Real de España* there is a law, that a traitor or murderer shall not be pardoned either by the king on the throne, or his successor. It appears likewise in Brissonius's most learned treatise, *De regis Persarum principatu*, that the kings of Persia (despotic as they were) could not pardon any capital crime; and this possibly may be chiefly alluded to by the passages in Scripture, which mention the law of the *Modes and Persians* as altering not. In Holland there is no power to pardon, if there is not a Stadtholder. *Consid. on the law of Forf.* p. 100.

STATUTES

STATUTES MADE AT WESTMINSTER.

4 Edw. III. A. D. 1330.

THESE statutes likewise consist of many different chapters, and the first which contains any thing remarkable is the eighth, which by some accident is the only chapter of the collection that happens not to have been translated; as it is not of any considerable length, I shall here give it in English: "As formerly a man with his horse used to pay only two shillings for his passage from Dover [*w*], and a man on foot only six-pence; and of late the keepers of packet-boats [*x*] have extorted greater sums: it is enacted, that, in the abovementioned port of Dover, and also in all passages and ferries on the salt, as on fresh water (as well as in arms of the sea), the passengers shall pay no more than was usual, nor shall the ferryman take more. And let the keeper of Dover-castle have notice of this, and let him put the law in execution at his peril; and if he finds any one who infringes the law, let him be punished at the suit of any one who will make complaint; and also let the bailiffs of such districts, where there are passages or ferries, do the same; and let the justices of assize have power also to enquire whether any one infringes the law, and they are likewise to punish as well upon the suit of the king, as the suit of the party." *11-21 Jac. 1. c. 28.*

I have the rather translated this chapter, because it is the only law in the Statute-book which relates to ferries; and is likewise a law which deserves much to be put in execution, though it hath escaped most lawyers, I believe, both from its antiquity, and from its not being translated. I should particularly doubt, whether the keeper of Dover-castle knows any

[*w*] The statute does not say to what place, which shews the perpetual intercourse between France and England at this time.

[*x*] In the original, *Gardeurs de passage, et passagers.*

9. thing of such a regulation, though the observance is so strongly enjoined to him, and that by an act of parliament which continues unrepealed. I have before observed, that we have no other law which relates to ferries; there are however several laws of this kind amongst the Scotch statutes, and one particularly, which makes this extortion in a ferryman amount to a felony.

STATUTES

STATUTES MADE AT YORK,

9 Edw. III. A. D. 1335.

IT appears by the preamble to these statutes [y], that the English would not permit aliens to trade in this country, at least not without frequent riots and disturbances, which I am afraid they are too much inclined to raise in the present times, and from the same prejudices. The law therefore enacts, that all *merchants, aliens, and denizens*, and all others, may buy and sell, “blez, vins (avoir de pois) chares, pessons “et tous autres vivies, et vitailles, lains, draps, et autre “merchandise.” The words in this clause of *avoir de pois*, are rendered in the common translation (which, when there is any real difficulty, generally leaves it as it stands) by the same words of *avoir de pois*, which seems unintelligible. I was first inclined to risque a bold *Bentleian* conjecture, that it should be read *avoin et foin*, i. e. *oats and hay*, which would agree very well with the context, and are not words very different from *avoir de pois*. I have however found, upon looking into a manuscript collection of the statutes, from the first year of Edward the Third to the twenty-eighth of Henry the Sixth, that the words *avoir de pois* are entirely omitted, at the same time that the words which precede and follow tally exactly; so that I have little doubt, but these unintelligible words (as they stand) were first inserted by a mistake of a copier, and that this mistake hath been repeated from edition to edition [z].

[y] It is very remarkable, that by 5 Edw. III. ch. xiv. it is directed, that a parliament shall *at least* be held once a year, and yet we have no statute from the fifth, till the ninth year of his reign.

[z] I have, since the former edition, found that *avoir de poids* is used, in the Life of St. Lewis, to signify every kind of bulky commodity; and Du Fresnoie gives the same signification to *averium ponderis*: the text may therefore stand as it is. The word *avers* is used in the statute of *John Burnel*, 11 Edw. I. to signify good, “pour ceo que merchautes ont prises leurs avers,” of which word *avoir* seems to be a corruption.

The legislature having given these privileges to the alien merchant, afterwards puts one very singular restraint upon him, viz. "that he shall carry no wine out of the realm;" which, I dare say, will at first be thought to favour the prevailing notion, that England formerly produced great quantities of wine. One should imagine that the Northern latitude, in which this island is situated, sufficiently contradicts what is so generally believed at present; and all experience shews, that the Northern parts of Europe grow warmer, in proportion to their cultivation: from which it is very clear, that England is more proper for vineyards in the eighteenth century, than it could have been in the thirteenth or fourteenth [a]. This notion seems to have been chiefly taken up from some old family deeds, which make mention of *vinæ*; but which Sir Robert Atkyns (in his account of Gloucestershire) hath proved to signify only orchards, and that cyder and perry were called *vinæ*, or *wines* [b].

As

[a] Ulysses, in the *Odyssey*, gives this account of the weather in the neighbourhood of Troy:

ὅς δ' ἄρ' ἐπὶ Τροίῃ καὶ χυ βόραιο πεισέρος
Πυρρὸς, αὐτὰρ ὕπαιθε καὶ γένε' ἔβρεχε
Ψυχὴν, ἢ χαλκὸς περὶ φέλο κρύεσθαι. Εἰ. 470.

which kind of night, it is believed, is not often now experienced in that part of Asia.

France produced no wine in the time of the Romans: it must not have been uncommon likewise for the Tyber to be frozen (rapid as it is said to be) since Juvenal, in his sixth Satire, says of the Roman ladies who were devotees:

Hybernum fracta glacie descendat in amnem.
Persius likewise begins one of his Satires:

Admovit jam bruma roco te, Masse, Sabino:

which shews that a Roman at that time enjoyed his fire in winter, as much as an Englishman may at present. It is said, that a modern Italian in the neighbourhood of Rome hath not any fire during the winter, except in his kitchen, which however often

vies in coolness with his grot.

Some of Ovid's Letters *de Ponto*, likewise, make mention of the Euxine sea being frozen; which the Memoirs of the Academy of Sciences also take notice of with regard to the Adriatic, in the eighth century.

Besides these proofs of the weather having been formerly more cold in different parts of Asia and Europe; it is observed in the Philosophical Transactions, for the year 1677, that the climate both of England and Ireland was then grown more mild. See also Observations on 8 Hen. VI.

[b] Miller's Dictionary, always consulted upon these occasions, hath likewise contributed to this error. I am far from detracting from the merit of that work (as to what falls within the author's knowledge as a gardiner), but shall take the liberty of disputing his authority, when he becomes the antiquary. In his article

of

As I therefore cannot agree to what may be thought the most obvious interpretation of this part of the law, it may perhaps be expected that I should explain it in a manner that may be more satisfactory.

Though we generally suppose at present, that the taste for the French wines in this country hath been occasioned by the additional duty, (as dearness often constitutes the chief merit of what is called a delicacy); yet it appears by all the old statutes, that the French wines, and particularly those of Gascony, were almost the only wines imported [c]. The provinces which produced them at this time belonged to the English crown, and therefore, in point of patriotism, there was the same reason for promoting the consumption that there would be for the consuming of wines, which were of the growth of our colonies [d].

of the Spanish, or sweet chestnut, he cites some of the old Chronicles, to prove, that there were great forests of this tree to the North of London, *which make no mention of this particular tree, but only that there were large woods in that part.* This tree shoots from the stoul, and therefore, if indigenous, must be in coppices after the timber hath been felled; and, I believe, no such tree was ever found in an English coppice: [as for firs we might have had them formerly, as they do not shoot from the stoul.] The old houses in London are likewise supposed to be built of this wood; I happened once to be present, when a wager determined this supposed chestnut to be nothing but common oak.

[c] Besides the proof arising from the old Statutes, Bishop Hall, in his Imitation of the lines in the Satire of Juvenal,

" Ipse capillato diffusum Consule potat,
" Calcatamque tenet bellis socialibus uvam;"

where he describes the great Man reserving the costly wine for himself, and circulating only a cheap sort amongst his dependants, says, that he kept the wine of Bourdeaux to himself. This early use of claret in England, from our own provinces, and the restrictions on those of France, may likewise in some measure account for the French not being fond of this wine: we have been used to it, and they have been used to the wines of other provinces which are nearer to Paris: we shall never relish frogs, nor the French perhaps puddings.

[d] It should seem that the balance of trade was greatly in favour of England whilst we were in possession of the French provinces, from the old French saying, " J'ay paye tous mes Anglois;" and the word *Anglois* is often used as synonymous to *creancier*, or *creditor*; see the Preface to Cotgrave's Dictionary, as also Borrel's Glossary, who cites these ancient verses:

" Que ne vy onques Anglois de votre taille,
" Car a tous coups vous criez, *baille, baille.*"

Since the former edition, it hath been suggested to me by a person whose name (from his deserved eminence in the literary world) I should be most proud here to mention, that in almost every treaty with France, from the time of Edward the Third to that of Henry the Eighth, there are stipulations for the payment of money, but that seldom any real payments were made to the English, which may likewise have contributed to the words *creancier* and *Anglois* being used as synonymous.

It was a matter of policy therefore to the common sovereign of the two countries, that the English should be supplied with wine from the French provinces at a reasonable rate; and consequently that there should be a high duty on these wines if exported elsewhere, or even sent to the adjoining provinces of France: this therefore might occasion the employing alien merchants, who purchased the wines in England without paying this high duty, and afterward re-exported them. It was therefore a wise and prudent regulation [e] to prevent so illicit an evasion of an indulgence granted for the benefit of English subjects; but which, by this contrivance, was the means of supplying foreigners with the wines of the French provinces (then belonging to the crown of England), without paying the foreign duties.

[e] There is an Ordinance of King John of France, which, if adopted in England, would greatly affect the vintners of this country: "Que les taverniers ne pouront donner nom a vin d'aucun pays, que celui dont il sera creu, sous peine de perdre le vin et de l'amende." Ord. Royales, p. 6.

THE

THE STATUTE OF PURVEYORS,

10 Edw. III. A. D. 1306.

THIS act of parliament consists of three chapters, followed by five articles; and there is an express memorandum on the Roll, "*Quod in parlamento predicto concordatum fuerit, quod articuli predicti non tenerentur pro statu.*" After this memorandum follows a writ, "*T. Rege apud Eltham [f] primo die Aprilis,*" in which the king directs the sheriff to proclaim certain statutes *made by the assent of the Lords and Commons*, and likewise *quendam articulum per nos et concilium nostrum super providentiis pro servitio nostro, et servitiis consortis nostræ, ac liberorum.* This seems to be the first strongly-marked and probably contested distinction, between a proclamation by the king and his privy council, and a law which had received the assent of the lords and commons.

The constitution began now to be understood: Edward, during his minority, could not assert any supposed prerogatives of his crown; and he was now on the point of declaring war against France, and consequently, wanting the assistance of parliament for supplies, was ready to make concessions. These continental wars (even if they had succeeded according to the most sanguine expectation) would possibly have made England a province of France; but we perhaps owe part of our liberties to the distresses in which they involved the crown [g]: nor will the constitution of this country ever be so much endangered as by a king whose coffers are full. Henry the Seventh and Henry the Eighth, by this means, established every thing but absolute monarchy; and Queen Elizabeth, by the œconomy of her treasurer (*so much commended by His-*

[f] The great hall in which this council was held is still to be seen: it is a very noble building, and is at present used for a barn.

[g] Henry the Fifth, in the midst of his conquests, was obliged to pawn the crown-jewels.

rians [h]), was enabled to continue the same despotic government.

This proclamation (for so it must with propriety be called) contains five different articles; though none of these articles are translated, except what may be styled the preamble or introduction to them.

I have before observed, that Edward was now on the point of declaring war against France. The 2d chapter of this statute shews, that he was raising cavalry for this purpose, and that the purveyance for the great horse [i] (*les grands chevaux*) was a grievance severely felt by the subject; and therefore particular commissioners are appointed to hear and determine complaints of this oppression.

After this follows the proclamation, which is divided into five chapters, and which relate to very miscellaneous matter. The second directs, that hundreds, wapentakes, and bailiwicks, which had been let to farm, and had been anciently annexed to the counties, should now, after a separation, be re-annexed, which I take notice of, as the dislevering for the convenience of the farmers of the crown lands, might have been the occasion of some of those odd slips of counties, which are surrounded by other counties.

The 4th article directs, that no writ of *Nief* [k] shall issue out of Chancery, but at the suit of those in whose names the

[h] I do not by this mean to condemn economy in a Lord Treasurer, but only to intimate that a king may be too rich; though it does not follow from this, that he should be necessitous.

[i] The great horse (in Latin, called *cataphracti*) were those which carried men, who were covered with a complete suit of armour, and who were absolutely invulnerable (before the use of fire-arms) if they did not fall from their horses, which were likewise covered with armour; this prodigious weight required the strongest and largest horses. The light cavalry, afterwards mentioned in this proclamation, were called *bobellarii*, from the riders being mounted on *hobbies*, or small horses. Purveyance for the king's dogs is also complained of in 14 Edw. III. ch. i. These were probably the dogs necessary to spring the game for hawking, as well as his hounds. Though it may possibly surprize that this grievance should be felt, there is, in the *Notice de diplomes*, published at Paris in the year 1765, an abridgement of some ancient French Records, which represent the great expence to the subject in providing for the king's hawks and dogs, p. 48 and 213. This collection, which is in Folio, was begun by Monsieur de Secouffes at the king's command, and is now continued by the Abbe de Foy, who promises a second volume. Carte's publication of the *Rolls* Gascones gave the first idea of this learned compilation.

[k] A *Nief* was a woman born in vassalage; in Latin, she is called *Nativa*.

writs shall be purchased, or unless the chancellor or his clerks are apprized that the said writs are sued with the knowledge and will of those who purchased them. This regulation seems to want explanation, and I apprehend the occasion of it to have been this. No one was entitled to a writ of *Nief*, but he on whose lands she was born, and so became a vassal. Some person probably about this time had attempted to get possession of a *Nief* which did not belong to him, and by abusing the process of law: the proclamation therefore directs, that the person suing the writ should be known at least to have a specious title to the *Nief* which he claimed, as otherwise a very short and tortious possession, might have much altered the condition of the female vassal.

The 5th article deserves to be written in letters of gold over the door of every treasury in Europe, as it recites more money to have been raised for the war against Scotland, than had been expended; and therefore orders that the surplus shall be equally divided amongst those who contributed to the tax.—

Vestigia pauca retrorsum.

STATU-

THE STATUTE PURVEYORS
[336]
**STATUTUM DE CIBARIIS
UTENDIS,**

10 Edw. III. A. D. 1336.

THIS statute is a sumptuary law to restrain the expence of entertainments, though we do not suppose that luxury had made very great strides in the fourteenth century : luxury however is only comparative, and a house-keeper of the present times means very differently in his petition for his daily bread, from what that petition was meant to entreat at the time of the Conquest.

The statute recites great inconvenience to the more opulent by excess in eating, to which “ les gentz du [1] “ royalme sont usez plus que nul part ailleurs;” and likewise the ruin to those of less affluent fortunes, from an absurd endeavour to imitate this extravagance. It therefore ordains, that no one should be allowed, either for his dinner or supper [m], above three dishes in each course, and not above two courses, and it is likewise expressly declared, that *soused meat* is to count as one of these dishes ; certain feasts are however excepted, in which three courses may be allowed. This law, in all probability (like most other sumptuary laws) was never executed with any strictness ;

[1] Fitz-Stevens, in his description of London in the time of Henry the Second, hath the following passage : “ Præterea est in Londonia supra ripam fluminis inter “ vina in navibus et cellis vinariis venalia, publica coquina ; ibi quotidie pro t. m. “ pore est invenire cibaria, fercula, assa, pista, frixa, elixa, pisces, carnes grossiores pauperibus, delicatiores divitibus, venationum, avium, avicularum. “ Quantalibet militum vel peregrinorum infinitas intravit urbem qualibet diei vel “ noctis hora, ne vel hi nimium jejurent, vel alii impransæ exeant ; qui se curare “ volunt molliter, acipenserem, vel Afram avem, vel attagenem Ionicum non “ querant, appositis quæ ibi inveniuntur deliciis.”

[m] Froissart mentions waiting upon the duke of Lancaster at five o'clock in the afternoon, when he had supped.

it serves however to shew our ancestors way of living, and perhaps we shall not suffer, in comparison, so much as is generally apprehended. We need not look further than into the bill of fare for a great feast or entertainment in these days, to see that the expence and gluttony were immoderate.

STATUTES

STATUTES MADE AT WESTMINSTER.

11 Edw. III. A. D. 1337.

THE Statute *De cibariis utendis* is followed by other laws made to restrain expence in dress, and likewise to promote the consumption of our own manufactures. Trade at this time began to be more understood, and likewise to be considerably extended, as Hakluyt [n] mentions privileges, in the year 1330, to the town of *Blackney* in Norfolk, on account of their commerce with *Iceland*. The great towns in *Flanders* had long been enriched with the staple of our wools: the statute therefore directs, that if a merchant shall export any wool, he shall be guilty of felony. At this time every session of parliament did not teem with new felonies; and therefore the legislature must have been highly sensible of the great national detriment by the foreign staples, to have made the offence, in the first instance, amount to a capital crime [o]. The next chapter forbids any one to wear cloth manufactured out of the realm, except the king, queen, and their children, and likewise permits the manufacturer to make them as long or as short as he chooses.

The 3d chapter orders, that no foreign cloth shall be brought into the kingdom under the penalty of forfeiting the cloth, and the importer likewise is to be punished by indictment.

The 4th chapter directs, that neither man nor woman [p], who cannot afford to spend 100*l.* a year, should wear furs,

[n] Hakl. vol. i. p. 244.

[o] Clergy is not indeed taken away by the statute.

[p] This is perhaps the first instance in the Statute-book of an apprehension, that a woman is not included under the word man. By the laws of Verona it is laid down as a general rule, that the mention of the male in a law shall include the female, "Quoniam sub autoritate juris civilis perniciose quandoque erratur, statuimus quod in omnibus statutis communis civitatis Veronæ masculinum genus comprehendat etiam foemininum, si illud de quo tractatur communiter se habeat ad utrumque." Leges Municipi. Veron. 1507. p. 63.

under

under penalty of forfeiting the furs [9], and they are likewise made liable to an indictment.

The 5th and last chapter grants privileges and immunities to the foreign manufacturer who will settle in this country; so that these statutes, which taken all together do not exceed forty lines, seem to contain a code of wise regulations, which have perhaps never since been rendered more perfect by any subsequent and explanatory statute.

[9] We see by ancient portraits, that, before the manufactures of gold and silver lace, furs constituted the greatest finery in dress.

STATUTES MADE AT WESTMINSTER,

14 Edw. III. A. D. 1340.

THE statutes now begin to appear in a new, and more regular form; the titles [r] henceforward are almost always English, and the session of parliament is generally held at Westminster [s], whilst the preamble in every instance makes express mention of the *concurrence of the Commons* [t].

The present *Capitularium* consists of twenty-one chapters, the greater part of which relates to the amendment of the law. The 5th chapter recites great delays and inconvenience to suitors, from the judges of Westminster-Hall differing from each other in opinion; and that therefore in every parliament a prelate, two earls, and two barons should be chosen, who should have power to send for the judges, and to give redress. This seems to be a very extraordinary regulation in the present times, as such prelates, earls, and barons would probably be very incapable of deciding the point on which they were to sit as judges of appeal [u]. Perhaps however the legislature might think them the more proper for not having had a legal education, as it appears, by other parts of this statute, that the decisions in Westminster-Hall began now rather to turn on subtleties, than doing substantial justice to the parties [w].

The 6th and 18th chapter afford instances of this kind,
 “ Item est assentu que par misprision de Clerc, en quecunque
 “ place que ce soit, ne soit proces aneantiz ne discontinue par

[r] The body of the statutes continues however to be in the French language.

[s] As the commons now always constituted part of the legislature, accommodation was not easily procured in other towns.

[t] The present preamble speaks of the attention necessary to the welfare *des petits, aussi bien que des grands*.

[u] The statute indeed permits them to consult with the chancellor, treasurer, and others of the privy council.

[w] Loisel (in his *Dialogue of Advocates*) remarks, that these subtleties were introduced into the French law about the same time; and that the ecclesiastical lawyers, who attended the popes at Avignon, were the occasion of this, “ et c’est de la que nous avons appris *la chicane*, s’il m’est loisible de parler ainsi.”

“ *misprendre*,

“ mesprendre, en escrivant *un lettre, ou un fillable trop, ou trop*
 “ *poi*, mes si tot que la chose soit aparceu, par challenge du
 “ partie, ou par autre manere, soit *hastivement* amende en dite
 “ forme sans donner avantage au partie.”

This difficulty with regard to altering process, or a record, is entirely peculiar to the law of England; and carried to the absurd excess and strictness [x] to which there was formerly a most blind adherence, hath occasioned the many statutes of *amendments* and *jeofails*. I do not mean by this to insinuate that records should be wantonly altered, but only where the alteration does not materially affect the point in dispute, and where the alteration is made under the control of the superior courts. As for the mistake of a letter merely, it is very extraordinary that this should have been fatal, as at this time no one (not even the greatest clerks) could spell with any accuracy; nay the same word, in the same period, is often spelt in a different manner throughout the body of ancient statutes. It is indeed absolutely impossible, that, before the use of printing, accuracy in spelling (which depends so much upon memory and extensive reading) could have been brought to any regular consistency or perfection.

This nicety in the setting forth legal proceedings is in many cases taken away by the statutes of *jeofails*, which do not extend to criminal proceedings [y]; by means of which many criminals have escaped the punishment due to their crimes, to the great encouragement of other offenders, and to the disgrace of the law. Some judges have thought, from a *false compassion*, that it is their duty to find out such mistakes, by which the criminal may be acquitted. I have ventured to call this a false and weak compassion, and am justified in thinking it so by that great judge Lord Chief Justice Hale, who was

[x] What greatly contributed to this strictness was the instance of a judge being heavily fined for the altering of a record; but this alteration was a very material one in its consequences. What I allude to is the known story of a clock being set up in Westminster-Hall, which was paid for out of this fine: it was therefore (without meaning to pun) a very striking memento to the judges.

[y] I must own I am not aware of any material or solid objection which there would be to make these statutes extend to criminal proceedings: no one could have heard of the late application to the House of Lords in the case of *Luckup*, to reverse a judgment of the King's Bench for what is called *error*, but must have wished that there was such a power to amend.

not only a most consummate lawyer, but is known to have been of a most remarkably humane disposition [z]. No man was more sensible of the duty incumbent upon every judge to be of counsel for the criminal; but what calls for such a duty, when the prisoner hath no compassionate or favourable circumstance, arising either from the proof of the prosecutor, or from his own defence? Is it not, on the other hand, the duty of the magistrate, *ne maleficia manean impunita*?

The 18th chapter of this law likewise takes away another inconvenience arising from too great nicety in pleading; it recites, that demandants in pleas of land had been often delayed, because the tenants have vouched to warranty a dead man, against which voucher the demandants before this time might not be received to aver that the voucher is dead, to their great delay and mischief: remedy is therefore provided, &c.

I do not pretend to understand the ancient forms of pleading in real actions, sufficiently to explain why this averment could not be received at common law; the statute however recites, that the law was so understood, which is not extraordinary, as it is a well-known story in Westminster-Hall, that a party in perfect health, who was hearing his cause, being killed by a pleader in a plea, the judges could not take notice that he was alive.

There are two other particulars in the 16th chapter of this statute, which I shall just take notice of. It relates to those persons before whom *nisi prius* may be granted, and says (amongst others) that it may be granted before the Lord Chief Baron, *if he is a man of the law*. This proves that even so late as the reign of Edward the Third, the Barons of the Exchequer were not considered so much in the light of judges, as officers of the revenue. The second is, that it may be granted before the justices of either the King's Bench, Common Pleas, or *sworn serjeant of the king*. I cannot help submitting a doubt, whether the practice of putting serjeants into the commission (who are not *Kings Serjeants* [a]) is pursuing

[z] See his History of the Pleas of the Crown, in which he says, these niceties are the disgrace of the law.

[a] Every serjeant at law indeed becomes so, in consequence of the king's writ directing

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suing the direction of this part of the law, though the objection may perhaps by many be considered as rather minute, after a different construction of this statute hath so long prevailed.

directing him to take upon himself the dignity of a serjeant: but the words *sworn serjeant of the king* seem to signify those serjeants only, who are properly styled *King's Serjeants*: other serjeants are styled simply *Serjeants*. The word *serjeant* formerly signified a military rank (as indeed it does at present) which seems to have either proceeded, or was only immediately inferior to the order of Knighthood. In the *assises de Jerusalem*, it is regulated how many both knights and serjeants shall be furnished by that district of country in Asia, which had been conquered by the Christians in their crusades; and in the preface to *Beaumanoir*, mention is made of the *chevaliers es armes, et en loix*, which seems to answer to our serjeant at law. So likewise in the *Romant de la Rose*,

" Qui veultu pour la loy defendre,

" Quelque chevalerie entreprendre,

" Ou soit darmes, ou soit de lectures,

" Ou autres convenables cures.

The *coif*, which a serjeant at law continues to wear, was originally an iron plate or skull-cap, worn by Knights under their Helmet. The word *Coif* is thus explained in a very learned Glossary, printed at the end of a new edition of the History of St. Lewis at Paris in 1761, from a manuscript lately discovered in the *French King's Library*, and where this authority from the old romance of Gerard de Nevers is cited, " Gerard tria l'espee hors du fourel; si assenne a celui sur la coiffe d'acier, un cop si grant, &c." The etymology of the word *serjeant*, however, seems to import something low, or base, as I should conceive it to be compounded of two words *Serf* and *Gentis*. Du Fresnoie (in his Glossary *Mediæ et infimæ Græcitatibus*) gives us the word *Σερβήσις*, citing *Anna Comnena* for it; the Greeks having adopted the term from the crusades, which is an additional confirmation that this word is not to be derived from *serviens*, as is supposed by most etymologists. The Greek word would be otherwise *Σερβήσις*, as the name *Valentinianus* is in Greek *Οὐαλέντιανός*. If to this it be objected, that the changing the *v* consonant into *b* holds only in the beginning of words; then the change should be at least from the *v* consonant to *b*, and the word would then become *Σερβήσις*; in the same manner that *Jovianus* and *Octavianus* become in Greek *Ιούλιανός* and *Οκταβιανός*.

The Realm and People of England shall not be
subject to the King or Kingdom of France.

14 Edw. III. Stat. v. A. D. 1340.

THE conquests of Edward had not only thrown the kingdom of France into a general consternation, but had given a most prudent and politick alarm to the English, lest they should become dependent by an union with the conquered country. This *supposed* statute is in reality only a strong declaration from the king, that this apprehended consequence shall not ensue from his victories. It begins, "Le roi a tous ceux, as queux cestes presentes lettres vendront, salut," and concludes by "en tesmoignance de quel chose nous avons mis nostre seal." This declaration is dated in the fourteenth year of his reign (in England) and the first of his assuming the title of king of France [b].

I have before said that this was a prudent and wise apprehension in the English, but it does not *necessarily* follow, that a lesser kingdom, by conquering a greater extent of territory, should in time become a province to the new-acquired territory, or that the seat of the empire should be fixed there, on account of its being more the centre of dominion; especially if the conquering country be an island, which will ever be a more secure place of residence for the king, than the strongest fortifications on the continent. For this reason, the king of Denmark resides at Copenhagen, because it is situated in the island of Zeeland, which hath not many other inducements to fix the royal residence. It was some centuries before the emperors of Rome changed that capital for Constantinople, and that rather from a whim or disgust of Constantine, than because Constantinople was more central. These instances are mentioned to prove, that the consequence does not *follow of neces-*

[b] The old French Historians and Chronicles allow, that Edward the Third's title to the kingdom of France was a good one, nor do they seem to feel much from the change of kings.

sity : it was most certainly wise in our ancestors, however, to make the earliest protestations and provisions, against so alarming and probable an event [c].

It is insisted at the end of this declaration, that no argument or construction shall be drawn from the king's having altered the seal or arms of England. This was occasioned by Edward's having very imprudently put the *Flower de luces* [d] (or the French arms) in the first quarter (as the blazoners term it), which is taken notice of by one of the ancient Chroniclers as having deservedly given great offence.

[c] Instances indeed do not very frequently occur in history of the lesser territory, or kingdom conquering the greater. It must be admitted that *Alexander* does not seem to have had any thoughts of returning to Macedonia, and his directions to his successors on his death-bed seem chiefly to have related to the securing his new conquest of Persia : it must likewise be admitted, that the Tartars (though conquerors) have established the seat of their empire, in the capital of China.

[d] It seems to be generally agreed by the French antiquaries, that these *Flower de luces* were originally meant to represent the heads of spears ; such a change is not unusual in ancient blazonry, from the painter's imperfect representation of the thing intended : the lions in the arms of England were originally leopards.

A Confirmation of the Great Charter and other Statutes.

14 Edw. III. A. D. 1340.

THIS confirmation of the Charters contains some very particular and extraordinary additions, besides the general confirmation, of which there have been two or three other preceding instances; and as this statute hath never been translated, it hath not been sufficiently attended to.

I have before observed, in the Comment on Magna Charta, that, in the early part of the English history (though long after Magna Charta was in force), the peers were often condemned and executed without the form of a trial by their peers, or indeed any trial whatsoever. The 2d chapter of this statute recites this, and expressly enacts, that, for the future, they shall be tried only by their peers [e]; and that, if a peer chose to submit to any other method of trial, it should not prejudice the rights of a peerage. The 3d chapter recites, that the commonalty of the realm had been prosecuted and imprisoned without *indictment*, contrary to Magna Charta; and therefore directs, that the chancellor, treasurer, barons, and chancellor of the Exchequer, judges of both benches, steward and chamberlain of the household, keeper of the privy seal, treasurer of the wardrobe [f], comptroller of the household, and the pre-

[e] There is an exception, if a peer is prosecuted as the *king's farmer*; which exception seems to imply that it was at this time understood, that a lord of parliament had a right to be tried by his peers for a misdemeanor.

[f] The treasurer of the wardrobe I conceive to be the same officer which is now styled the master of the wardrobe, at whose office some payments still continue to be made. It appears by Fleta and others, that treaties and acts of state were frequently deposited in the *Wardrobe*, which then contained a large district, in which the king's artisans lived; and there is a parish in the city still called *Sr. Ann's Wardrobe* from this circumstance. This range of buildings was burnt in the fire of London, and it hath since been found better economy to purchase what is wanted from common tradesmen: it is probable, that many valuable records were destroyed in this office by the fire of London.

ceptor [g] and chief officers of the duke of Cornwall, shall take an oath, upon entering into their office, to observe the Great Charters in every article. This oath (though it is most strictly enjoined by this statute to be taken by these great officers) makes no part of the oath, which is printed in a collection of the old forms of oaths, in 1649, though the law continues unrepealed.

The 5th chapter enacts, that the king should remove [b] the great officers (beforementioned) five or six days before every parliament, in order that those who had complaints to make might not be deterred by dread of their power and influence; and that the king might with consent *des grantz*, which should be most near to him, substitute others in their places: this was indeed a most extraordinary regulation, and I should think, was the chief pretence for the proclamation which ensues. This most constitutional statute (at least the four first chapters of it) had scarcely passed when Edward, by the advice of his privy council, issued a proclamation, which contains the following most hypocritical and illegal reasons for not allowing it to be a binding and obligatory law. “ Et quia editioni predicti statuti *pretensi* nunquam
“ consensimus, sed premissis protestationibus de revocando
“ dictum statutum si de facto procederet *ad evitandum peri-*
“ *cula quæ ex ipsius denegatione tunc timebantur* provenire,
“ cum dictum parlamentum alias fuisset dissolutum, cum
“ magna negotiorum nostrorum ruina: *dissimulavimus (sicut*
“ *oportuit)* et dictum pretensum statutum sigillari permisi-
“ mus hac vice: videbatur dicto concilio nostro, quod ex
“ quo dictum statutum ex voluntate gratuita nostra non pro-
“ cessit, et quod nomen et vim statuti habere non deberet.
Ideo [i] &c.”

I should imagine that no one can read these passages of the proclamation without feeling indignation, and thinking that its being published in the Statute-book as an act of

[g] Ceux que sont chiefs deputez a demorer prez du fies le roy, duc de Cornouaille.

[b] There is an exception of the Judges and Barons of the Exchequer.

[i] The meaning of this preamble is very obvious, but I must admit, that I cannot make out the construction of it.

parliament, is a constitutional and national disgrace. Under pretence of the same *prudent dissimulation*, the most important and sacred statutes might for ever be evaded. I have before, in the character of Henry the Third, had occasion to observe, that some of our kings, most celebrated for their conquests, had attempted to make the greatest infringements upon the constitution. The present proclamation furnishes a most striking proof of this, and it is dated in the first year in which Edward the Third assumed the title of King of France.

18 Edw. III. Stat. ii. A. D. 1344.

THIS statute consists of seven chapters; and the preamble and first chapter have never been translated, though the six other chapters are. There is a most singular recital in this French preamble, viz. that the French king, “s’afforce tant come il poet a destruire notre dit seigneur le roi, ses alliez [k], et subgitz, terres et lieux, et [l] la lange d’Angleterre.” The complaining that the king of France intends to destroy the English language, in the preamble to an *English act of parliament speaking in the French language*, seems to be one of the most extraordinary allegations which were ever thrown into the preamble [m] of a statute. The law then expresses the intention of the legislature to support the king in the strongest manner in his war against France, as they clearly foresee [n] the destruction of England, if Edward does not immediately pass the sea; and they exhort him steadily to pursue, and never to drop, this great and important purpose, neither for *letters, words, nor fair promises*, from which it should seem that the English already began to distrust themselves as *negotiators* [o]. The parliament not only

[k] This is the first mention of the word *ally*, which unfortunately we hear too much of in the more modern part of the English History.

[l] In my manuscript (beforementioned) it runs, *terres et lieux de la langue d’Angleterre*, which is perfectly intelligible, and the sense reconcileable to the context. Since the former edition, I have happened to met with the word *landa*, used by Dante, in the 14th Canto of his *Inferno*,

“Dico, che arrivamo ad una *landa*;

which his commentator observes to be a very uncommon Italian word, and to be formed from the old French word *lande*, and which signifies the same with our word *land*. If therefore this word *lange*, or *langue*, is altered to *lande*, the absurdity is removed, without the making the insertion from the manuscript of, *de la langue*, instead of *et la langue*.

[m] The statute of Elizabeth, for translating the Bible and Service of Common-prayer into Welsh, recites, that it is with intention to make the Welsh learn English the more readily; which is likewise a very singular recital, and would not escape notice in an *Irish* statute.

[n] The word *yvant* should be read *vyant*; a word vitiously spelt for *volant*, or seeing.

[o] It is admitted, that we do not hear of any complaint of the insufficiency of English negotiators, till the pamphlets which swarmed after the peace of Utrecht, and

only gives this exhortation, but likewise grants taxes, in which it is observable, that the lords and prelates *join* with the commons; though afterwards mention is made of two fifteenths granted by the *commonalty* of the realm, and two tenths by the *cities and boroughs*. From this it should seem, that the knights of shires, and the representatives of cities and boroughs, were considered in a distinct light; and that the commonalty was only bound by the assent of the knights of the shires, and the inhabitants of cities and boroughs by their own representatives. The clergy and lay-peers might possibly at this time likewise make two distinct independent bodies in the house of lords; and the preamble of a modern act of parliament always states the assent of the lords *Spiritual and Temporal*, though the lower house are comprehended in the general name of *Commons* in parliament assembled.

The 2d chapter of this statute directs, that two or three (*des mieultz vavetz des countees*) shall be appointed conservators of the peace, and that they shall have the king's commission to hear and determine trespasses and felonies. As for the word *vavetz*, which is translated "men of the best reputation in the county," it is to be found in no glossary; nor does any word occur which bears any great affinity to it. Upon consulting my manuscript of the statutes, I find the word used instead of it, is *vaillantz*, which agrees with the translation. It is true, we generally use the word *valiant* as synonymous with the word *courageous*: in the old French writers, however, *valiant* (from *valere*) signifies only a man of worth; and *courageux* signifies *angry* [p]. It is very extraordinary, that justices of the peace should have so much declined the trying of felonies; when it appears by this statute (to which they owe their institution) that it was the chief purpose for which they were appointed.

and during Sir Robert Walpole's administration, when his brother, Mr. Horace Walpole, was ambassador in France: one need say no more of these than that they were party pamphlets. The Abbe Mongon hath done justice to the memory of Lord Walpole, and says, that Cardinal Fleury was throughout his dupe, which is highly probable, as he was so far advanced in years.

[p] Thus, in the preamble of 1 Edw. III. Stat. i. "*continuant leur mauveste, moverent le corage de dit Roy Edouard.*"

The 4th chapter repeals all commissions to assay weights and measures; which I should not have taken notice of, did it not recite the abuses of these commissions: abuses, which have prevented the different statutes (from Magna Charta downwards, which relate to weights and measures) from being carried into execution.

THE

THE OATH OF THE JUSTICES,

18 Edw. III. Stat. iv. A. D. 1344.

WHETHER it arose from the king's having been frequently absent during his wars with France, or whether from increase of trade and riches [q], the law itself, the people of the country, and the judges who were to dispense the law to the subject, each wanted at this time much reformation. We find this from the recitals to many statutes of this reign, and likewise from that volume of the Year Books, which is entitled, *The Book of Assises*, where, by the articles to be inquired into by the judges of the King's Bench, it will appear, that there were abuses in the administration of justice (though, according to modern ideas, a high conception of it hath been formed), which are now happily not even heard of, much less are they necessary to be restrained and punished [r].

These

[q] The 6th chapter of the statute last observed upon makes mention, for the first time, of the circulation of *gold coin*.

[r] "Ceux sont les articles que sont enquires per enquest d'off. en Bank le Roy, fait a enquirer de homicides, larcens, arfours de meaf. ravifours des femes, et de tous manner de felons et de felonies, et leur receptors, procurors, et maintenant, auxi bien de temps le roy le pere, come de temps le roy que ore est, esclapes de larons, &c.

"Item de ceux que l'owent misfours de battre les gentes de court, jurors d'enquests, ou ascuns auters homes, queux sont les bators, et ceux que les l'owent, &c.

"Item des endiftors que sont garner les enditees*, et discoverent le counseil le roy, et des justices, et de leur compaynons.

"Item de ceux que veignent forciblement en court le roy counter assises, en affreiant de la peas, que les jurors n'osent dire veritie.

"Item de gardeins des prisons, qui, pur dred de penance, sont les prisonnes deven' provours, et appeller' lays gentes pur covetise de gaine.

"Item de ceux que teignent gentes a leur robes ou fees pur verities extinger, et pur maintenir leur mauvaises emprises, &c.

"Item de conspirators, et confederators que foyent'raliont par serement, covenant, ou par autre aliance, que chescun eidera et sustendr' autre emprise, soit il faux ou veritie; et que fausement fait endict et acquit' gentes, ou fausement move ou maintein plees.

* This explains the meaning of that part of a Grand-juror's oath, by which he promises not to disclose the king's counsel.

"Item

These articles of inquiry, which the Year Book fixes to the twenty-fifth year of this king's reign, shew the prevailing crimes at this time; and the oath of the judges, now regulated by parliament, shews what was objected to them in their dispensing of justice. The first material part of the oath is, that they shall not take fee or present from any one, if it is not meat or drink, and that of a very small value; they then swear, that they will not take robes from any one, except the king, nor give counsel or advice to any one where the king is party; and the statute having so far considered them as officers paid by the crown [1], then provides for the equal distribution of justice to the subject, by making it part of the oath, that they shall not regard any letter or message from the king, with relation to any point depending before them, which is likewise a provision of one of the most ancient of the Scotch statutes.

The necessity of a judge's taking this oath having been thus enjoined by the legislature, it was one of the articles of complaint against Richard the Second in the succeeding reign [2], that he had made the judges and other great officers take oaths of a new form, when they entered upon their office; and that these new oaths were administered *in secret*. Notwithstanding this, the oath continues to be administered in private; the occasion of which I should imagine to arise from the judge being sworn on his knees before the chancellor: if this is improper, it should be banished from the private room, as well as the open court.

" Item de coroners, des chiefes constables des hundreds, que elizent gents de petit value, et espargnent lez bons pur leur don; et dascun hundred qu'on afesse pur tiels articles a trouver a c s, ou a x marks, ou ils levent x li, a grand oppression de people.

" Item des garde de prisons que apprenent laies persones que sont en leur garde l'ettur' per ca'e de salvat' d'lour vie en desturbament de la com'ley, que la justici ne se peut faire sur eux come sur laies gents en deceit d'el roy.

" Item des taxors, et quillors de xv d' que per eux et leur ministres parnent certains fees a leur clerks, hushers, et autres leur ministres, et pur faire acquit'.

" Item de tous servants, officers, et ministres le roy; Archevesques, Evesques, Dukes, Contez, Barons, et tous autres quecunque de leur trahisons, extorc' et greivances fatis al' people le roy, et de leur donefons et grandsuns prises et levies de people le roy, pur grandisment de leur seigniorages, ou en autre maner.

[1] It appears by 20 Edw. III. ch. i, that the king at this time had encreased the salaries of the judges.

[2] Graft. p. 8.

THE STATUTE OF LABOURERS,

23 Edw. III. A. D. 1349.

THIS *supposed* [u] statute recites the great increase of wages occasioned by a plague, some labourers now taking advantage of the scarcity of hands to insist upon extravagant wages, and others choosing rather to beg and live in idleness, than to earn their bread by labour. Besides the other calamitous circumstances which attend a pestilence, it is remarked by all historians [w], who have given an account of occurrences during this melancholy scene of desolation and distress, that the manners of the people (from despair [x]) become dissolute and abandoned beyond conception: nor is this dissoluteness at once removed by the ceasing of the pestilence: the statute therefore speaks the language, and introduces regulations, of severity.

By the first chapter, every person able in body, and under the age of sixty, not having means of maintaining himself, is bound to serve him who shall be willing to employ him, at the wages which were usually given the six years preceding the plague; and if he refuses, and it is proved by two witnesses before the sheriff, bailiff, *lords* [y], or constable of the village where the refusal is given, he is to be committed to gaol, and continue there till he finds sureties for entering into service upon these terms.

[u] No mention is made of the intervention of the commons, which must henceforward be looked upon as absolutely essential, what ever it might have been before.

[w] Particularly Boccace, in his account of the plague at Florence, which gave occasion to his Decameron, and which seems to exceed the celebrated description of the plague at Athens by Thucydides. I do not by this mean that Thucydides's being more particular with regard to the symptoms, may not make it more valuable to posterity from the information, which physicians may receive from it.

[x] Those religious sects who suppose their state of salvation to be desperate, are, for the same reason, most remarkably wicked and abandoned.

[y] The words of the statute are, *vicecomiti, iudice, domino aut constabulario villæ*, which word *dominus*, I should conceive to mean lord of the manor.

By

By the 7th chapter, no one is to give alms to a beggar, who is able to labour, under penalty of imprisonment, “*Nemo sub colore pietatis, aut eleemosynæ quicquam donet, seu eos in desidia fovere præsumat, ut sic compellantur pro vitæ necessariis laborare [z].*”

By the last chapter, some penalties, imposed by a preceding part of the law, are disposed of in a very unusual manner: they are not given to the informer [a] (as in more modern times) to enforce the execution of a statute, but in aid of *disfnes* and *quinzimes* granted to the king by the commons.

Whether the neglect of this statute arose from this improper distribution of the penalty, or more probably from the severity of the law, the parliament, two years afterwards, in the twenty-fifth of Edward the Third, attempted to carry it into more rigorous and effectual execution; and likewise added some new regulations, fixing the price of not only the wages of the *labourer*, but almost every kind of *artisan*. Some of the particulars are curious, and are a good standard to settle the comparative value of money, which often throws great light upon the more ancient statutes.

The common labourer, in the hay harvest, is only to have one penny a day, except a mower, who, if he mows by the acre, is to have 5*d.* per acre, or otherwise 5*d.* a day. A reaper [b] is to have, in time of corn harvest, 2*d.* the first week in August, and 3*d.* till the end of the month [c]; and they are likewise neither to ask meat, nor any other perquisite or indulgence. The law also requires, that they shall repair

[z] There is an ordinance of King John of France (Edward's contemporary), that the clergy shall preach against this false charity of giving alms to those who are able to work. Ord. Royales, p. 5. Since the introduction of the Poor's Laws, it is become still a more weak and false charity to an Englishman; a foreigner or negro, however, may still want our alms in this country.

[a] The proportion of a penalty, which shall be given to an informer, seems to be now settled, viz. half; at first, however, it was commonly a fourth, and afterwards, by later statutes, a third, till the half, at which it is now fixed: even this large proportion seldom hath its effect.

[b] *Sciours de bles*; the mower is termed *faucheur des prezz*: this statute hath never been translated.

[c] No one conceives more highly of parliamentary powers; but this regulation (depending upon the season) seems to exceed even the omnipotence of the legislature.

to the next town or village, carrying their scythe or sickle *openly* in their hands, and shall there be hired in some public place. This regulation of the statute (though in other respects disregarded) seems to have been the occasion of what is now seen in country towns, when labourers want employment.

The 2d chapter directs, that no man in harvest (before settled to be in the month of August) shall leave the village in which he lived during the winter, except the inhabitants of Staffordshire, Derbyshire, Lancashire, Craven, and the Marches of Wales and Scotland. The occasion of which is, that there are large tracts of mountain or moorland in all these counties and districts, where nothing can be raised but oats, which often are not ripe till October, and, consequently, if the labourers were not employed in more early harvest, they would be without any means of getting their livelihood, during the months of August and September. For the same reason, the inhabitants of the *Pyrenees* come for six weeks into the Southern provinces of France, and return in proper time for the getting in of their own harvest.

As I have mentioned, that the wages allowed to labourers by this law shew the comparative value of money: I shall likewise refer the reader to the appendix of the third volume of Dr. Brady's History, where there is a very particular account of the pay of Edward the Third's army, in the twentieth year of his reign. The pay of the Black Prince was 20*s.* *per diem*: the sum total, is 12,720*l.* 2*s.* and 9*d.* for which an army and fleet of 31,294 men was to be payed and subsisted for sixteen months, which possibly may rather astonish a modern board of treasury, or contractor for Germany. There is likewise, in Sir Richard Cox's History of Ireland, an account of the salaries of most of the principal officers of the crown at this time, from which the same comparative value may be drawn.

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OF THOSE THAT BE BORN BEYOND THE SEA.

25 Edw. III. Stat. ii.

THIS statute recites a doubt [*d*], whether children born of parents out of the king's allegiance should inherit lands in England; which question, it seems, had been before the parliament in the eighteenth year of this king's reign, but nothing had been decided. The statute first declares, that it is the law of the crown of England [*e*], and hath always been so, that the children of the king, born in any part of the world, hath a right to inherit; and this, according to the observation made in the note below, is a strong argument to prove, that, in the case of a common subject, the law was apprehended to be otherwise. I should imagine, that this parliament (or the judges of the time), if they had been consulted whether Philippa of Hainault, queen of Edward the Third, *had been naturalized by her marriage*, would not have long hesitated about the answer.

After this declaration, the statute having naturalized John de Beaumont, Elizabeth, daughter of Guy de Bryan, and Giles, the son of Ralf Daubenye, gives a very extraordinary

[*d*] The French expression, in the original, is *en avera*, and not *en averouft*; which is always used by Littleton, in his Tenures, to signify a doubt.

[*e*] This is always considered as part of the common law, and differs, almost in every rule relating to it, from what is law in the case of a subject. Thus a queen consort may make a will, may sue, or be sued, &c. Lord Coke, in his first Institute, p. 31. B. says, that in certain cases a wife shall not be endowed of her husband's estate, and particularly if she be an alien: he excepts however the case of not only a queen of England who is an alien, but also a foreigner who's married to the brother of a king of England, and instances the queen of Navarre, who was married to Edmond, brother to Edward the first; he likewise mentions that it was so resolved by all the judges of those times, who were assembled on that occasion.

power to the king, viz. that *as many others* as he should please to name, should be to all intents and purposes naturalized; and likewise enacts, that for the future all children born of parents (subjects of the king) should inherit, except the children of mothers who shall pass the sea, without *leave of their husbands*

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THE STATUTE OF TREASONS,

25 Edw. III. Stat. v. A. D. 1351.

I SHALL take a very extraordinary liberty with regard to the title of this statute, which I have altered from the *Statute of Purveyors*, to that of the *Statute of Treasons*. It is true, that the first [*f*] chapter of this law (as well as the 13th) relates to purveyance; but the 2d great constitutional chapter, which hath defined what shall be deemed treason, hath certainly a right to give a title to this *Capitularium*; which chapter (after many new treasons enacted during the reign of Henry the Eighth) is fixed upon, by the first of Philip and Mary, as the statute declaratory of the common law, and which therefore should continue in its full force without alteration, whilst the other laws of tyranny are entirely repealed.

As the declarations made by this statute of what shall be deemed treason are generally known by not only lawyers, but even every one who hath read an English historian with any degree of attention, I should not have stated any of the particulars, did it not give occasion to some observations.

It begins by declaring, that it shall be treason to *compass*, [*g*] or *imagine* the death of the king. There have been many comments upon these words *compass* and *imagine*; and I should with great deference think, that, notwithstanding the general excellence of this most wise and important statute, the word *imagine* is not sufficiently explicit, and is

[*f*] It consists of twenty-three chapters.

[*g*] *Fait compasser ou imaginer la mort notre seigneur le Roi.* Is it not extraordinary, that the life of an Englishman, prosecuted by the crown, should continue to depend upon the critical construction of two obsolete French words? The word *imagine* is used in the Psalms, ii. 1, in the same sense with *plot*: *Why do the beaten so furiously rage together? and why do the people IMAGINE a vain thing?*

likewise too figurative to be made use of in describing this most capital of all criminal offences. The Lombards, indeed, by their old laws, make use of still more loose and figurative expressions, “Si quis *contra animam regis cogitaverit*” [h].” The *Fuero Jusgo*, in describing the offence of treason, makes use of the expression *que trattaren* [i] *del morte del principe*; which is likewise a most loose expression, though the Spaniards were at that time a more free people, than perhaps in any other part of Europe [k].

The compassing or imagining the death of the queen (described by the word *Madame sa compaigne*), is likewise declared to be high treason. Upon this expression there have also been doubts, whether a queen-dowager is included; I do not mean by this to say, that such doubts have not received a very satisfactory solution, but only that it might have been worded in this part with greater precision. The designation of the queen, by the words *Madame sa compaigne*, seems to be singular; we find however the same expression in other laws of Europe [l], “Los hijos y *com-panna* del rey han de ser bien tratados, y que najie les haga *furca*, ni danno algun [m].” It is next declared, that the counterfeiting of the king’s great, or privy seal, shall likewise be considered as high treason; which I should not have taken notice of (as this part of the law cannot be more clearly expressed), did not a writ, printed in the original French, at the end of some other statutes [n] of the same year, give us the intimation of a very great neglect in this

[b] Some of the ancient English grants are very figurative: *Omnes libertates et aquas circa Hull, quas cor cogitare poterit, aut oculus videre.* Rymer, vol. ii. part ii. p. 183.

[i] The Royal Dictionary, published at Madrid in 1739, gives many different significations to this word, and none of which comes up to the sense in which it seems to be used in this law, which is, “*shall concern himself in, or plot, the death of the king.*”

[k] Nath. Bacon says, that, in the time of the Saxons, an indictment for high treason against the king, ran *felonice*; if against the country, *proditorie*: he would have obliged antiquaries much by printing these indictments at length, as well as writers on the constitutional law of England.

[l] Afferius, in his life of Arthur, mentions, that the Saxons never described the queen by the word *regina*, sed *tantum regis conjugem appellabant.*

[m] *Fuer. Jusg. lib. i. p. 52.* The children and wife of the king are to be well treated and respected, and the law is to protect them from any injuries.” This law supposes the king to be dead.

[n] Cay’s Stat.

part of the act, and which, in some measure, seems to countenance an observation made by Carte, that no lawyer sat in this parliament, when this most constitutional statute became a law [o]. This writ mentions a claim made by the clergy, that a clerk, who was convicted of counterfeiting the great, or privy seal, or the king's coin, should have his privilege of clergy, to which the king answers; "that he is too much pressed by business of the greatest importance to decide this point, but that, if any clerk should be convicted of this offence before the next session of parliament (in which he hopes it will be fully discussed), he shall not be executed, but delivered to the ordinary." We find accordingly, that this point must have been before the legislature, and yet nothing is said with regard to the privilege of clergy. It might be impolitick indeed (from circumstances), that this point should have undergone a discussion in parliament; but as the clergy had, in effect, established this privilege, the opportunity of taking it expressly away by statute should not have been omitted.

The statute then proceeds to offences in counterfeiting or debasing the coin, which have been made capital in all countries where a coinage hath been established [p]: as it is therefore universally a capital offence to counterfeit the coin, it is much to be lamented, that those kings who have debased the money of the state, and have ordered the money thus debased to pass at the sterling price, are not subject to a prosecution for this offence on their part [q].

As treason is in all states considered as the greatest crime of which the subject can be guilty, I have looked into the laws of most countries in Europe on this head, which in general are much more loosely worded than the present statute, at the same time that the punishment is sometimes more severe by its tortures, than can ever answer the great end

[o] Carte mentions this observation invidiously.

[p] It is made so by the ancient Athenian laws, *ἐάν τις τὸ νόμισμα διαφθερῇ, τὸν δάνατον τὴν ζυμιανεῖται*. Petit's Leg. Att. p. 40. and, by the Russian law, the criminal is punished by being obliged to swallow the base metal, in a state of fusion. Strahlenbergh's Russia.

[q] Henry the Eighth is said to have taken this method of filling his coffers. To the great honour of the kings of England this hath not been attempted for the last century; very recent instances are not however wanting in other parts of Europe.

for which executions become necessary. If the criminal in his agonies excites the pity of the spectator, the crime for which he suffers is forgotten, and the law and its ministers are considered as cruel and vindictive. There seems to be one particular in which all the laws (where the government is in the hands of a king) agree, viz. that it shall be high treason *to kill his counsellors*; which arises from this, that the pretence, in the conspirator, is generally to remove the minister, whilst the king himself is supposed to be blameless [r].

[r] Sir Francis Holburne hath printed a reading on this statute in the year 1681.

A S T A-

A STATUTE OF PROVISORS,

25 Edw. III. Stat. i. A. D. 1351.

SIR HENRY SPELMAN gives this account of the meaning of the word *Provisors*, as used in this Statute; the general signification of the word being synonymous with a *purveyor*. “*Provisores etiam dicuntur, qui vel episcopatum, vel dignitatem aliam ecclesiasticam in Romana curia sibi ambiebant de futuro, quod ex gratia expectativa nuncuparunt, quia usque dum vacaret expectandum esset [1].*” As this statute is to be considered as a sort of manifesto against the court of Rome, the preamble is more full and laboured than that of any other law which hath yet occurred.

The resistance and opposition to the papal encroachments was not confined to England at this time; for we find, in Boulainvilliers [2], a petition (*du tiers etat*) to King John of France, that he would insist upon the privileges and immunities of his kingdom against Pope Boniface. Fortunately for this country, the successes of Edward had made the English nation so respected and feared throughout Europe, that these provisions were thoroughly carried into execution; whereas the humiliating adversities of the French made them less capable of asserting their national dignity and privileges against the papal impositions. England likewise, by its advantage of insular situation, was less subject to the papal power, which could only be enforced by the pope's employing the army of a catholic country against the state which lay under his anathemas; whereas an invasion of England was impracticable from any other country but France, then much depressed. The other method which the pope hath of enforcing his assumed powers is, by fomenting a rebellion against

[1] The word *Proviso* might therefore be not improperly rendered a *looker-out*.

[2] Vol. iii. p. 72.

the excommunicated king in his own country. This likewise could as little be effected, Edward being at the height of popularity from the eclat of his victories ; and, besides this, the parliament joined with him in resisting the Papal encroachments from the strongest motives of interest, as by this means they secured their own presentations to ecclesiastical benefices, when they happened to be in lay hands,

Though the encroachments of the church of Rome are mentioned throughout this law in their proper light, yet the pope himself is treated with great respect, being styled *Le sainte pere*, or Holy Father [u]. One of the titles therefore of this statute, viz. "the king and lords shall present unto "benefices of their own, and not *the bishop of Rome*," hath most evidently not been taken from the parliament roll, but hath been added by a translator or editor since the Reformation.

What most deserves notice in this statute, is the explanation of the *conge d'eslire*, upon the vacancy of an archbishoprick or bishoprick. The statute supposes, that the *free election* in the chapters had been originally granted by the king's progenitors, upon condition that they should have first asked leave of the king to choose, and after the election also requested his assent [w] ; which conditions (says the statute) having been neglected, it is reasonable that the thing should *return to its first nature*. Now, in the first place, this previous and subsequent assent of the king does not seem to be very reconcileable to what is stated to have been a *free election* [x], and in which the chapters still continue to invoke the Holy

[u] The beginning of all the letters, from the kings of England to the pope, in the twelfth, thirteenth, and fourteenth century, is, *Papæ Rex devota pedum oscula beatorum* : the meaning of this is very obvious ; but there seems to be a difficulty in filling up this elliptical compliment. An ingenious and learned friend hath suggested to me since the former edition, that the word *post* is always to be understood before *devota*.

[w] That the king did not recommend, and that the pope's confirmation (after the election) was applied for, appears by an instrument printed (from a manuscript in the king's library) at the end of the second volume of Collier's Ecclesiastical History, p. 63.

[x] Whitelock compares the election of a Speaker of the House of Commons (at least according to the practice in his time) to the election of a bishop by a *conge d'eslire*, and says that, to save trouble, the king recommends a Speaker, whom the commons afterwards elect. Comm. on Parl. Writ. vol. i. p. 224.

Ghost to assist them in their choice: nor is there to be found in Rymer any instance of the kings of England interfering in such an election. The king and parliament were however determined to exclude the pope from nominating, and assumed the right of supposing what they pleased to substantiate their own claims, and the salutary and beneficial consequences attending the fiction have given a proper sanction to it.

The statute not having deterred sufficiently some of these provisors, who still solicited at the court of Rome, for benefices, and appealed against the decisions of the king's courts, occasioned, two years afterward, the first statute of *Premunire* [y], which is so called not from that word being used in the law, which is in *French*, and directs a *garnissement*, or warning of two months, before such provisor or appellant can be punished [z]. The writ to the sheriff, founded upon this statute, however, being in Latin, gives notice of this warning by the word *premunire* (a barbarous word used for *præmonere*) from whence these laws have since been so styled. The punishment for not appearing after such warning is imprisonment, to be put out of the king's protection (which signifies the protection of the king's court of justice), and a forfeiture of lands and goods.

This first statute of *Premunire*, in the twenty-seventh year of Edward the Third, contains eight chapters, the four last of which relate to Gascony wines, and, having never been translated, seem to have been little attended to by lawyers. The 5th chapter enacts, that it shall *be felony*, if any English merchant shall engross or forestall wines in Gascony; nor may he at any rate purchase them of a *Gascoon* by money to be paid in England, if the price exceeds what wine is usually sold for in Gascony. When parliaments enact laws in order to lower the price of provisions [a], they generally make the regulations upon the *spur of the occasion*, as Lord

[y] Collier, in his *Eccl. Hist.* asserts, that the first statute of *Premunire*, is not to be found in the Tower, vol. i. p. 595. See also an expostulatory letter of Pope Martin, occasioned by these statutes, vol. i. p. 729.

[z] He is on *this warning* to surrender himself.

[a] Wines must be considered in the same light with provisions.

Bacon expresse it, and with too eager and warm a spirit of reformation. This sometimes is productive of statutes of most extraordinary severity (as the present most undoubtedly is), and this new and extraordinary felony must likewise have been committed in Gascony; and therefore it seems to have escaped the legislature, that the offence being local, could not have been tried by the jury of any English county [b].

The next chapter enacts, that no English merchant, or person employed by him, should be permitted to go into Gascony, but just before the vintage [c]; and that no Englishman shall even at that time purchase any wines, but in the towns of *Bayonne*, or *Bordeaux*, under the same penalties; which are, forfeiture of the wine, and likewise the other forfeitures consequential to a felony; and if any one infringes these regulations, he is to be apprehended by the *seneschal* of Gascony, or the *constable* of *Bordeaux*, and sent *in vinculis* to the Tower of London. It need not be observed, that these provisions of the statute are of a very extraordinary nature and severity, and therefore by 37 Edw. III. ch. xvi. this law is repealed as far as relates to the punishing of the offence as a felony. In all other respects this statute is again confirmed, with this edition, "that the seneschal and constable of Bordeaux shall yearly transmit to England certificates against those who have broken the law, together with the bodies of the offenders, who, if they contradict the certificate, it is to be tried by a jury of merchants who trade in those parts." If the offender is not sent together with the complaint, the certificate is to be returned into the King's Bench, from whence process of outlawry is to issue. These statutes continued in force till the forty-third of Edward the Third [d], which in the preamble sets forth, that these laws of severity were *pur assay profitable*; but, notwithstanding this, upon the representation of the prince of Wales

[b] This seems to be another confirmation of Carte's assertion, that there were no lawyers in this parliament.

[c] Persons residing at Gascony to buy up the wine are, by 37 Edw. III. ch. xvi. called *cocheours engleys*, viz. *liers in wait*.

[d] This statute likewise hath never been translated.

[e] (whom

[e] (whom Edward styles his dearly beloved son), that the duties which he used to receive from the dutchy of *Acquitaine* were considerably diminished, the parliament enacts, that the two preceding statutes shall remain in suspense [f], till the effects of this repeal are known.

I have stated these heads of the different laws of this reign with regard to French wines, that any admirer of the legislation, or notions of liberty in these times, may ask himself the question, whether a member of either house of parliament could possibly have proposed such regulations since the Revolution? We find, however, that these laws not only passed, but continued in force for many years; and even when they are repealed, it is to increase the revenue of the *Black Prince*, without the least complaint or notice taken of the oppression to the subject.

[e] The French Chronicles take notice, that the *Black Prince*, was in infinite distress during his residence in Gascony, from living upon a too magnificent and expensive establishment; and that the consequence of this was, his laying a most oppressive tax of *fouage* (or *hearth money*) upon the Gascoons.

[f] This is supposed to be perhaps the only instance of a temporary suspension of a law, till an uncertain event happens.

STATU.

STATUTUM DE STAPULIS,

27 Edw. III. Stat. ii. A. D. 1353.

THIS statute is a most complete code of laws for the regulation of the merchants who attend the staples of wool, now transferred from *Flanders* to *England*, and to give the most summary and expeditious justice upon all contracts, entered into during the continuance of this great mart. The compilers of the Parliamentary History suppose, that the chief occasion of Edward's removing the staple from the Great Towns of *Flanders* to *Newcastle under Lyne*, *York*, *Bristol*, &c. arose from his being displeased with the *Flemmings*, for disappointing him in an intended alliance between his daughter, and their young Earl, *Lewis*. Slight circumstances of this kind perhaps often occasion the greatest events in history, though they are generally accounted for from more deep and important causes; and it hath been said, that we owe the famous navigation-act (the great foundation and support of our commerce) to a personal dispute between *St. John*, ambassador from the *Commonwealth* to the *States*. *St. John*, from this pique, determined to propose to the English parliament regulations, which should prevent the Dutch from being the common carriers of Europe [g].

The different chapters of this law speak sufficiently for themselves, without needing any comment or observations: it may be remarked, however, that the preamble to this statute first styles the parliament the *King's Great Council*; and it should seem, that for most counties there was but one representative at this time, instead of the two which they send at present [b]. The words are these: "En bone
" deliberation

[g] It appears however by the debates of the House of Commons, in 1620, published in the present year (viz. 1766), that these regulations were at that time thought of.

[b] It hath been suggested to me by a person of great erudition (since the former edition),

S, " deliberation ove prelates, ducs, counts, barons, chivalers
" des countees (cest a scavoir, *un pour toute la coun-*
" *tee*), et des communes des citees et burghs de nostre
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edition), that the county of Bedford, in the twenty-third of Edward the First, returned three members for that shire only, without including the members for any boroughs in that county.

THE

THE STATUTE OF HERRINGS,

31 Edw. III. Stat. ii. A. D. 1357.

IT appears by Dugdale [1], that a parliament intervened between the twenty-seventh and thirty-first year of this king's reign; we have however no laws of this intermediate session in the Statute-book. The preceding law having made a complete body of regulations with regard to the wool-staples, the legislature now take under their consideration the state of the herring fishery on the Eastern coast near Yarmouth, [k] which at that time was one great branch of trade, not only because the country was now of the Roman-catholic persuasion, but because salted meat and fish were the winter's store for every one's house, the markets not being supplied with fresh meat as at present. The parliament undoubtedly intended to promote and encourage this fishery by regulations, which were supposed to be of a wise and beneficial nature; whoever reads them with attention, however, will wish that this statute was repealed, as indeed should most of the other ancient statutes with relation to trade, as the principles of it were at this time but little understood. By way of proving what I have here ventured to suggest, I will only mention two of the new provisions. The first is, that no one shall buy nets, hooks, nor other instruments necessary for fishing, which are used in the county of Norfolk, except the lords [l], masters, and mariners, who use the craft of fishing, under pain of imprisonment, and being fined at the king's will. The other provision is, that the chancellor, treasurer, and the

[i] Summ. Parl.

[k] Sir Henry Spelman (in his *Icenia*) speaks thus of the state of the herring fishery at Yarmouth, in the reign of Q. Elizabeth: "Retia illic piscatoria Londinum ab *Fermutha*, sc. 100 mill. porriguntur: quod cum in parlamento 35 Eliz. palam audissem affirmatum, et ut certior fierem sciolum convenissem: respondit, compertum fuisse suffectura ea ad totum spatium inter *Fermutham* et *Belgiam* occupandum, dum ab una navi ad alteram (piscatorum more) jungerentur." Reliq. Spelm. p. 155.

[l] In the original, *seigneurs, maistres, et mariners des nief*; the translation should be *owner*, instead of *lord*. There are likewise several other mistakes.

king's privy council, may make what regulations they shall please with regard to the price of salted fish. The thirty-third of Edward the Third, which likewise relates to herrings, recites, "that they were sold at a most unreasonable price, " occasioned (as the statute says) by many merchants [m], " as well labourers as servants, coming to the fairs, and " every one by *malice* and *envy* encreasing the price upon his " competitor, so that if one *bids four-pence*, another *offers* " *ten-pence more*, and *so every one surmounteth the other in bar-* " *gaining.*"

It is scarcely to be conceived, that a statute, which proceeds upon such recitals, should have continued so many centuries unrepealed.

[m] The word *merchant* in the original is translated by the same word in English: it now bears a much more confined sense than it did at the time of making this statute.

STATUTES

STATUTES MADE AT WESTMINSTER,

34 Edw. III. A. D. 1360.

THESE statutes are a *Capitularium*, consisting of twenty-two chapters; and I should not have made any observations upon them, was it not for the opportunity of fixing the signification of two words used in the first and last chapters of the law.

The statute directs, that in every county in England there shall be appointed, for keeping the peace, “*un seigneur, et avecque lui troits ou quatre de meult vavetz [n] du countee ensemblement ove ascuns sages de la ley.*” This is translated, “there shall be *one lord*,” &c. Now the word *seigneur* by no means signifies a *lord* who is a *peer of parliament*, as the word is generally understood; of this we had an instance in the preceding law, where the master or owner of a fishing vessel is styled *seigneur [o]*; and in the present statute it is impossible it should so signify, as there were not at this time a sufficient number of peers to furnish a justice of peace for each county. The common sense however in which this word is understood, seems to have led Sir Edward Coke [1] into a mistake, when he asserts, that the *High Steward*, at the trial of a peer, must *necessarily* be a lord of parliament. I have looked into the authorities from the Year Books, cited in proof of this position, which by no means warrant what he asserts, at least in the extent he hath advanced it. As for the case in 1 Hen. IV [q], there is not a word in it which proves the necessity of this great officer's being a lord of parliament; and as for the second authority, viz. 13 Hen. VIII

[n] *Vavetz* should be read *vaillantz*, as I have before observed on the 18 Edw. III. Stat. iii. and my manuscript of the statutes again confirms this alteration.

[o] So by 37 Edw. III. ch. xix. which punishes the concealing of a hawk with two months imprisonment, the owner is styled *seigneur*.

[p] Inst. 4. p. 58.

[q] Term. Mich. p. 1. By this case however it appears, that the high steward is to ask the peers their verdict, *en leur conscience*, from which it should seem, that the answer originally was *upon my conscience*, and not *upon my honour*.

[r], the

[r], the words used in the Year Book are these: "Nota
 " quand un *seigneur de Parlement* serra arrain de trefason, ou
 " felony, le roy per ses lettres patentes fera un grand et sage
 " seigneur [s] d'estre le grand seneschal d'Angleterre; which
 certainly imports nothing further than that he shall be a man
 of consequence [t] any more than the word *seigneur* does in
 the present statute: and we find, that when a peer is men-
 tioned in the above-cited passage from the Year Book, he is
 styled *Seigneur de parlement*.

The last chapter relates to the reclaiming of a stray hawk,
 and directs, that it shall be carried to the sheriff of the coun-
 ty, and, if no one claims the hawk within four months,
 that it shall become the property of the sheriff, upon condi-
 tion that he pays a proper satisfaction to the person who
 brought the hawk, *fil soit simple-homme*: but if a gentleman
 (*gentil-homme*) reclaims it after the four months are expired,
 the sheriff is still to restore the hawk, upon being payed the
 charges of keeping it. This distinction used between the
simple-homme, and the *gentil-homme*, seems to explain the
 meaning of the word *gentil-homme*, which is used in so very
 vague a sense at present [u]. I should conjecture, that the
simple-homme, is John or Thomas [w], who hath no surname;
 and in contradistinction he who hath a surname, or family
 name, from the word *gens* [x], is styled *gentil-homme*.

[r] P. 1. Term. Pasch.

[s] The addition of *de parlement* is not here repeated.

[t] The word *seigneur* is derived from *senior*, age formerly giving the only rank
 and precedence.

" Credebant hoc grande nefas, et morte piandum,

" Si juvenis vetulo non assurrexerit." JUVENAL.

Thou shalt rise up before the hoary head. Lev. xix. 32.

[u] In an action brought on this statute, the meaning of the word must be
 settled; as that of the word *Esquire* must likewise be, on some of the game-
 laws.

[w] Surnames are of no great antiquity in this country, nor have many
 of the common people in Wales to this day any surname. So Menage, in
 his Dictionary, informs us, that the peasants in Languedoc have no surnames,
 but are distinguished by their own Christian name, joined to that of their father,
 as Pierre de Guillaume.

[x] The word *gens* sometimes signifies family.

STATUTES MADE AT WESTMINSTER,

36 Edw. III. A. D. 1362.

THIS *Capitularium* consists of fifteen chapters, which have little connexion with each other. We have often heard before of the grievance of purveyance [y]; and it is almost from year to year the subject of parliamentary regulations, whilst, notwithstanding the repeated interposition of the legislature, it is still matter of complaint. The device of making it more palatable to the subject, by the 2d chapter of this law, is a most extraordinary one, viz. “*que le heig-nous nome de purveyor, soit change, en nom d'achetour,*” which, as it hath not been translated, I shall render, “that the hateful name of *purveyor*, shall be changed to that of *achatour* [z].” This conceit of remedying an oppression, merely by giving it another name, seems rather unworthy of a legislature, yet the change of a name may perhaps sometimes have its effect; as if the taxes which are at present called the *king's*, were styled those of the *public* (for whose benefit they are in reality collected) they might possibly be more chearfully payed; or at least juries might be more willing to convict in offences against the laws of the customs and excise, which are seldom at present trusted to a common jury.

The last chapter of this law recites, that great mischiefs have arisen, “because the laws, customs, and Statutes of this realm are not commonly known, and because they are” *pleaded*,

[y] It appears by 7 Rich. II. ch. viii. that purveyance was not only insisted upon by the king, but also by many of the great Lords within certain districts.

[z] This word is derived from *acheter*, to buy; and there is an office of *achetery* still subsisting in the king's kitchen. There is likewise the Italian verb of *accattare*, which is still nearer to the word *achatour*.

“Men Dio offende, et men biasimo *accatta*.”

Dante, Inferno, Canto 11.

The *Crusca* Dictionary renders this word, either by *mutuari*, *mendicare*, or *invocare*; in the above passage, however, it plainly signifies to gain, and may therefore also signify to buy, or purchase.

OBSERVATIONS &c.

"pleaded, declared upon, and decided [a], in the French language, which is *much unknown* in this kingdom, so that the parties to suits do not know what is said either for them or against them by their serjeants and pleaders;" and likewise because the king, the nobles, and others, who have travelled in diverse regions and countries, have observed that they are better governed by the laws being in their own tongue: the statute therefore enacts, that all pleas shall be in English, and that they shall be entered on record in Latin [b].

Selden says, that this law took its rise from an inconvenience rather supposed than felt; for though some kind of knowledge of law-terms may be increased thereby, yet, unless the law is professedly studied, it will breed nothing but notions and overweening conceits, which often engage men in law-suits to their great loss; he adds, however, "that thus in part the reproach of Normandy rolled away, like that of the Israelites at Mount Gilgal." But, with proper deference to so great an authority, few such law-suits have ever been occasioned by what he apprehends; and it is not only a wise law from the reasons mentioned in the preamble, but we find that the legislature have carried this alteration still further, by directing that the pleadings shall be inrolled in English; and there is besides an ordinance of Oliver Cromwell's, that all the law-books shall be translated from the old French, into the English language [c].

There is in Carte's Rolles Gascones, vol. ii. p. 87. the title of a record in the following year (viz. 1363: "De carpentariis capiendis pro operationibus apud *Calestram*;" and then follows, "ibidem recitatur statutum contra *provisores*, et *horribile eorum nomen permutatur, in nomen d'acheteurs*;" which shews, that this change of the name was considered as the most material part of this statute.

[a] In the original, *pledez, monstrez, et jugez*, which words are omitted in the common translation.

[b] Whitelock asserts, that no mention is made in the parliamentary roll of the necessity of the record's being made up in Latin. Comm. Parl. Writ. vol. i. p. 345.

[c] James the First, in his Speech from the throne to parliament in 1609, recommends, that the books of the common law be written in the mother tongue; that the people might know what to obey; and that the lawyers in law, like popish priests in the Gospel, might not keep the people in ignorance. Wilson's Life of James the First, p. 47. I should imagine, that this recommendation arose from the king's inclination to sit as judge in the King's Bench, which Sir Edward Coke objected to, and probably amongst other reasons, because his majesty would not understand the law French of the reporters.

This law does not want the approbation of many others who had occasion to consider it, and particularly of Rastall, who, in his Preface to the Abridgement of the Statutes, highly commends it [d]. Voltaire, in his additions to the *Histoire Universelle*, speaks thus of this law, and others to the same purport: “ Rodolphe de Hapsburgh avoit ordonne
 “ dans l’Allemagne, qu’on plaider, et qu’on rendit les arrêts
 “ dans la langue du pays. Alphonse le sage en Castille etablit
 “ le meme usage. Edouard le 3^{me} en fit la meme en Angle-
 “ terre. Enfin Francois Premier ordonna qu’en France ceux
 “ qui avoient le malheur de plaider, pussent lire *leur ruine*
 “ *dans leur propre langue* [e].” I shall make no apology for this citation from Voltaire, though many think that he writes only to amuse, without any authority for what he advances. The letters of Fabricius (who was secretary to Charles the Twelfth of Sweden at Bender), which have lately been published, shew, that what was looked upon as an entertaining romance, is the most authentic history. I have often heard the same objection to Mr. Hume’s History of England; and, as it should seem, with as little foundation. Both these masterly writers not only instruct, but entertain the reader, and (from what cause I know not) we are always diffident of what pleases; on the contrary, we give implicit credit to a dull writer, who makes a perpetual parade of authorities which he does not understand, and from which he is incapable of drawing the proper inference.

There were four other parliaments held during this reign, in each of which there are some few statutes, but none of them either need illustration, or throw any light upon either the law, the history, or antiquities of this country. In the year 1376, an act of indemnity and general pardon [f] passed, the reason for which (as set forth in the preamble) is,

[d] This Abridgement of the Statutes, printed in 1517, is now very scarce; the whole Preface may however be seen in Ames’s History of printing, p. 142, et seq.

[e] Denina, in his dissertation *Sopra le vicende della letteratura* (printed at Glasgow in 1763), says, that Francis the First’s having made this alteration arose from the French word *debouter* having been translated into the law Latin of that time, by the word *debotare*. In a tract however written by John Cook, Chief Justice of Munster (printed in 1652), it is asserted, that Francis the First procured a large subsidy from his subjects for this ordinance.

[f] The only person excepted is the famous William de Wickham.

that the king had now reigned for half a century, and that there was to be a general *Jubilee* [*g*] throughout the land. May there be occasion for such an act in the next century !

Edward died full of years and glory ; though the ascendancy which Alice Pierce [*h*] gained over him (whilst in his second infancy) somewhat clouded the latter part of a life, which should have ended, as that of Augustus did, with a *plaudite*. I shall not however consider either his virtues or his failings any further than they affect his character as a legislator. I have already, in some of the statutes of his reign, observed, that they were oppressive ; and the frequent confirmations of the *charters*, and particularly in the four last parliaments, shew that he had a constant inclination and intention to break through them, whenever a proper opportunity offered [*i*]. He will, notwithstanding this, for ever deserve to be venerated by posterity for the statute of *Provisors*, by which the seeds were sown of that freedom and independency in the church of England, which prepared the minds of men for the Reformation. Whatever may have first contributed to this, may justly claim our warmest gratitude ; though the dread of the papal anathemas is now happily so far removed, that we can scarce credit any free people could have submitted to such encroachments, and national indignities.

[*g*] I have been informed, that, when a man and his wife have been married in Germany fifty years, there is a sort of second marriage celebrated with the greatest festivity.

[*h*] Daniel asserts, that the ascendancy of Alice Pierce was so great, that she used to sit on the bench with the judges in Westminster-Hall, when she happened to interest herself in a cause. Dan. p. 72. and it appears, by a record in Rymer, entitled, *De Nave vocata la Alice*, that the same flattering attentions were shewn to her, as to the more modern *Pompadour*. Vol. iii. part. iii. p. 47. 50 Edw. III.

[*i*] His not allowing the statute of the fourteenth year of his reign to be obligatory (already observed upon), should not likewise be here forgotten.

STATUTES MADE AT WESTMINSTER,

1 Rich. II. A. D. 1377.

RICHARD was but eleven years old when he became king of England on the death of his grand-father. The summons and preamble to these statutes [*k*] make mention, in the common form, of its being the first year of his reign, except that he does not assume the title of King of France, as Edward the Third had always done from the year 1336. I should imagine, however, this omission must have been occasioned by the court-intrigues, hurry, and confusion, which must always attend the first parliament of a minor king [*l*]: a confusion which we are now happily delivered from, by an established regency, and that by the sanction of parliament [*m*].

It should seem, that a king of England hath constitutionally a power of appointing a regent by his will; though the successor, when a minor of but six months old, is said to have no imbecillity *in the eye of the law*, and is as complete a king, and his acts as valid, as when of the most mature age. From this an artificial argument may be drawn, that he cannot want or receive a guardian; and yet, if such a guardian is appointed, the parent hath a natural right to nominate, and the person named, by having the possession of the infant king's person, must in effect be regent or protector; and by

[*k*] This parliament was called the *Good Parliament*. Stow's Chron. p. 280.

[*l*] It is very extraordinary, that in no country (where the government by an hereditary monarch prevails (it should have been settled (as a general regulation) at what age an infant king should be considered as a major. Solomon is said to have been but nineteen, when he made his famous decision between the two mothers. A Roman consul could not regularly be a candidate for the office, till he was forty-three years of age. Minorities of their kings are denounced by Isaiah, to complete the national calamities of the Jews. *And I will give children to be their princes, and babes shall rule over them; and the people shall be oppressed.* Isaiah iii. 4, 5.

[*m*] We find in Rymer an appointment of twelve counsellors to assist the treasurer and chancellor the day after he came to the throne: this amounts to no more, however, than the appointment of a new privy council, which is usual upon every king's accession.

this there is a known responsible person to the publick, who may answer for the acts of the royal minor. Henry the Fifth, whilst in France, and on his death-bed, called in some of his principal officers, and in their presence made a hasty verbal appointment of the duke of Gloucester to be regent of England, and the duke of Bedford regent of France. This was however immediately set aside by the parliament, on the accession of Henry the Sixth; and the duke of Bedford was nominated protector of England, as being the king's elder uncle. Afterwards, in the [n] eighth year of the same king, we find an appointment of the duke of Gloucester to be protector of England, by writ of privy seal merely, without the intervention of parliament.

The next provision for a minority in the crown was by 25 Hen. VIII. ch. xxi. by which it is enacted, "that, if the
" crown shall descend to a minor king under eighteen years,
" or a minor queen under *sixteen* [o], their mother shall be
" the guardian, together with such counsellors as the king
" shall nominate by his will." I am aware that from this it may be argued, that a king of England hath not the power of appointing a guardian without the concurrence of parliament; but the occasion of Henry the Eighth's having recourse to this sanction, probably arose from the parliament's having set aside the hasty death-bed appointment of Henry the Fifth, and which likewise broke in upon the natural rights of the duke of Bedford, as being the elder uncle to Henry the Sixth. The difficulty of settling this important point of constitutional law arises from the precedents being few in number [p]; the last instance hath certainly the intervention of parliament, and the appointment by Henry the Fifth was set aside: we do not find, however, any complaint of the power assumed by nominating a regent; and, if the king hath not such a power, he is deprived of the natu-

[n] Rymer, vol. iv. part iv. p. 160.

[o] It may be perhaps difficult to assign why a king of England was not to be a major till *eighteen*, whilst a queen became so at the age of *sixteen*.

[p] Whoever consults the case referred to the judges by George the First (in Mr. Justice Fortescue's Reports) upon the question, whether the grand-father being king, or the father being only heir apparent, hath a right to take care of the education of the royal children, will find that the material precedents are likewise too few in number to settle that very important point.

ral right which every subject hath of entrusting the education of his child to those in whom he can repose the greatest confidence. Sir Edward Coke hath a particular, but short chapter on the *Protector of England*, in his *Fourth Institute*, in which, after referring the reader to some records which explain the power and nature of his office, he concludes by saying, *the surest way* is to have the authority of parliament.

Having been led to this digression, by the present parliament being assembled in the first year of a minor king [q], I shall now proceed to consider the subject-matter of the statute.

The 6th chapter is the only part of this law which hath not been translated, and is at the same time the only one which requires any comment. It recites, "that the *villeyns* [r] had assembled riotously in considerable bodies, and had, by the advice of certain evil counsellors and abettors, endeavoured to withdraw their services from their lord, not only those services which they owed to him by tenure of their lands, but likewise the services of their body [s]." That they chiefly attempted to evade these services under colour of certain exemplifications from *Domesday-Book* [t], with relation to the manors and villages in which they lived; and that, by false and bad interpretation of these exemplifications, they claimed to be entirely discharged and free. The statute therefore enacts, that commissions shall issue under the great seal, upon application of any lord (*seigneur*) to inquire into the

[q] Sir Peter de la Mare, knight of the shire for the county of Hereford, was the speaker in this parliament, and the first speaker mentioned in any record. See Cotton's Abridg. p. 155.

[r] I shall take the liberty of spelling this word out of the common method, to avoid the equivocal sense which it hath obtained at present.

[s] This is the distinction of services, which Littleton divides into villenage in gross, and villenage appendant.

[t] This is the only mention made of *Domesday* in the statutes. The common etymology of the word *Domesday*, in which all the Glossaries agree (viz. the comparison of it to the day of judgment), never appeared to me satisfactory; if this whimsical account of the name was the real one, the Latin for it would be *Diei Judicii*; whereas, in all the old Chroniclers, it is styled either *Liber Judicialis*, or *Censualis*: Bullet, in his Celtic Dictionary, hath the word *Dom*, which he renders *Seur*, *Seigneur* (and hence the Spanish word *Don*) as also the words *Deya* and *Dein*, which he renders *Proclamation*, *Advertisment*: *Domesday* therefore may signify the Lord's, or King's, advertisement to the tenants who hold under him, and agrees well with part of the contents of this famous survey.

offences and riots of these rebellious *villeyns*, and that they shall be immediately committed to prison without bail or mainprize, if they cannot procure the assent of their lord [u]; and likewise with regard to these exemplifications (which had been ordered to be laid before parliament) it is declared, that the offering them in evidence, shall not be of any advantage to him who shall so produce them.

Nothing could be more oppressive than this law in every part of it; and we find by different records in Rymer, that this oppression was, in reality, the occasion of the famous insurrection, under *Wat Tyler* and *Jack Straw*, as well as the great opposition to John of Gaunt, duke of Lancaster.

The minor king had been advised, by one part of his council, to increase the power of the lower people [w], and to lessen that of the barons; and in consequence of this a proclamation issued [x], which, amongst other things, directed, “quod nulla acra terræ quæ in *bondagio* vel *servagio* tenetur, altius quam ad quatuor denarios haberetur; et si qua ad minus antea tenta fuisset, in posterum non exaltaretur.” John of Gaunt put himself at the head of the barons faction, and procured a proclamation, repealing the former, in the year following [y]. The record, under-cited, from Rymer, is attended with many others, “pro rege Castellæ super fictiones et diffamationes insurgentium—Pro rege Castellæ de securitate contra insurgentes,” which security is allowing him to be attended by a guard; and lastly, he is appointed *Justiciary* to try them.

But to return to the tenure of villenage, which we hear nothing of at present; and therefore, like many other things which most commonly occur, no one considers from whence this kind of tenure hath been entirely dropt in this country, with-

[u] By 15 Rich. II. ch. xii. we find that, amongst other oppressions to the lower people, the lords instituted a kind of *quo warranto*, and obliged them to lay their title to their lands before their counsel, or auditors; at least, I understand the statute to convey this meaning.

[w] In the sixteenth year of this king, the barons petitioned the king, that no villeyne should send his son to school; to which the king gave the proper answer of *avisera*. Brady, vol. iii. p. 393. By a Scotch Statute of James the Fifth, every freeholder is enjoined to send his son to a grammar school.

[x] Rymer.

[y] Rymer, vol. iii. part iii. p. 124.

out its being abolished by any statute [z]; and which is the more extraordinary, as it seems to be generally agreed by historians, that more than half the lands of England were anciently held by this tenure, and the greater part of the inhabitants were consequently in a state of vassalage.

This kind of base tenure was not only in the early centuries known throughout Europe [a], but continues perhaps in every other country [b] but that of England to this day. Though there seems to have been scarce any difference in this servitude wherever introduced, yet the names have not any kind of affinity. The Saxon appellation was *Cheorl*, or *Agen-hine*; and Stiernhok, in his treatise *De jure Sueonum et Gotthorum vetusto*, says, “emptionem et venditionem fervorum ut pecudum, per mediatores et testes fieri solitum, ut apud Anglo-Saxones.” By the laws of Hoel Dda, the villeyns are called *Taragua* [c], and they are in other places styled *Fileinjaid*. These expressions, or any thing relative to the villeyns, do not indeed frequently occur, as the tenures in Wales were almost intirely allodial; and there is not at present any such thing as a copyhold in the counties of Anglesey, Carnarvon, and Merioneth; nor are there in Ireland any such tenures.

In Ireland, they were termed *Betaghii* and *Betaghies*; in Italy, they were anciently called *Lazzi* [d] and *Liti*; and a particular class of them *Aldi*, who seem to have had rather more freedom than the other classes: they were also called *Vasfri* and *Accolæ* [e].

[z] The statute of Charles the Second (or rather of Cromwell) abolishes those tenures only, which were attended with wardships, &c. besides this, we hear nothing of it after Queen Elizabeth; and little in her reign.

[a] Olaus Magnus indeed says, “nulla servitus apud Gothos, ut apud Danos.” p. 707.

[b] Many of the labourers, in the salt works and collieries of Scotland, still continue *glebæ ascriptitii*, and cannot be hired without the proprietor's consent. Diction. Decis. vol. i. p. 312. Anderson therefore is mistaken when he asserts, that all vassalage ceased in Scotland after the Protectorate. Hist. Comm. p. 106.

[c] From hence *Teague* is probably a term of reproach amongst the Irish.

[d] Hence possibly the French word *lache* or *base*. The word *lazzi*, however, is clearly of Italian origin, from the two *z*'s, which is peculiar to that language. *Dante* uses this word to signify four, or of an austere, and harsh taste.

“Et e ragion, che tra li *lazzi* forbi,
“Si disconvien fruttare il dolce fico.” Inferno, Canto 15.

[e] Lindenbrog. passim. Baluz, vol. ii. p. 746.

In Germany, and Prussia particularly, they still make a very considerable head of the law: in the king of Prussia's Code Frederique, they are called *Eigenbehorige* and *Unterthanen*; and they are described to be such as are, "attaches a certaines terres de leurs seigneurs, qu'ils ne peuvent manier hors des terres."

With regard to the word *villey* itself, so well known to our ancient lawyers, though so little heard of in more modern times, Voltaire gives us this etymology, "villain vient de ville, parceque autrefois il n'y avoit de nobles, que les possedeurs des chateaux [f];" and Froissart, in the time of Edward the Third, applied it to *the mob of London*, "vous devez sçavoir que les vilains de Londres estoient grandement corrouces; et disoyent, haa gentil Chevalier Comte de Derby [g], les grans envies qu'on a sur vous."

I shall now endeavour to shew in what light these villeyes were considered in different periods of the English history, and how the tenure was at last (and almost insensibly) forgotten and abolished.

To begin with the authority of Cæsar, "Cum ære alieno, aut magnitudine tributorum, aut injuria potentiorum premuntur, sese in servitutem dicunt nobilibus; in hos omnino eadem sunt jura, quæ domino in servos."

Bracton is our most ancient writer on the law except Glanvil; and he gives this account of the state of villenage in his time: "*Gleba ascriptitii liberi sunt, licet faciant opera servilia; cum non faciant eadem ratione personarum, sed ratione tenementorum [b]*; et a gleba removeri non possunt, quamdiu pensiones debitas persolvere possunt." And in another part, "*purum villenagium est, qui scire non potest vespere, quale servitium fieri debet mane.*"

The next authority, with regard to the condition and situation of this rank of people which I have happened to meet with, is that of Froissart, who informs us, that "un usage est en Angleterre (et aussi est il en plusieurs

[f] Add. Hist. Univer. p. 151. it should seem that, for the same reason, the name of burghers derogates from nobility.

[g] Afterwards Henry the Fourth. Froissart, part iv. p. 316.

[b] This is clearly confined to what Littleton calls *villenage appendant*.

"pays),

" pais), que les nobles ont grans franchises sur les hommes,
 " et les tentent en servage [1]."

In the year 1514, Henry the eighth manumitted two of his villeyns in the following form: "Whereas God created all
 " men free, but afterwards the laws and customs of nations
 " subjected some under the yoke of servitude, we think it *pious*
 " and *meritorious with God* to manumit Henry Knight, a taylor,
 " and John Herle, a husbandman, *our natives* [k], as being
 " born within the manor of Stoke Clymmyssland, in our
 " county of Cornwall, together with all their issue born, or
 " to be born, and all their goods, lands, and chattles acquired,
 " or to be acquired, so as the said persons, and their issue, shall
 " from henceforth by us be free, and of free condition [l]."

The above-cited form of enfranchisement (which I cannot recollect from whence I transcribed it, though I should believe from Rymer) explains the general condition of these people: if born within a certain district, they and their issue [m] were the bondmen of the lord; and whatever personal property they acquired, they laboured for the advantage of their lord, and not of themselves. Besides this, they could not leave the manor, on which they were from their birth in a state of servitude, without the leave of the lord; and therefore according to Domesday, "*liber est qui potest ire quo*

[1] I will make no apology for citing Froissart, though born in Flanders; he had lived many years in England, and had an office under Philippa of Hainault queen of Edward the Third.

[k] The *natives* became a villeyn, by being born in servitude, within a particular manor or district; as for the *bordarii*, *totterelli*, and *cottarii*, these were cottagers, whom the lord had permitted to build on his waste. So Ferretier, in his Dictionary, informs us, "*qu'on appelle cottier tout homme qui demeure dans son heritage cottier, et vilain*;" and he likewise gives us this account of the word *cottaria*, of which so much hath been said of late; "*Cottarie se dit des compagnies et societes de villageois demeurant ensemble, pour tenir du seigneur quelques heritages, qu'on appelle tenus en cottarie*."

[l] In the year 1536, and 28 Hen. VIII, a bill, *concerning Bondmen*, was rejected by the House of Lords on the third reading, which according to this idea (of its being *meritorious with God*) was probably for their general manumission. Manuscript Calendar of the Journals of the House of Lords.

[m] This explains what frequently occurs in ancient grants of villeins *cum tota sequela sua*; which, according to Sir James Ware, in his account of the *Betaghii* (who were the Irish villeyns) included not only children, but nephews, p. 149; see also Madox's Form. Angl. p. 416. If the mother of the children was a *nief*, and the father was *free*, the children became free, contrary to the rule of the civil law: *Partus ventrem sequitur*; and contrary to the rule of the old French law: *La verge annoblit, et le ventre affranchit*.

" vult ;"

“vult;” and hence the writ in the register, “Præcipimus
 “tibi quod iuste et sine dilatione facias habere A. de C. B.
 “nativum et fugitivum, cum omnibus catallis suis, et tota
 “sequela sua.”

They were also, by the customs prevailing in particular districts, subject to services not only of the most servile, but the most ludicrous nature; “Utpote die nativitatis Domini
 “coram eo saltare, buccas cum sonitu inflare, et ventris cre-
 “pitum edere [n].” In some manors, the lord had “jus
 “luxandæ coxæ sponfarum vassallorum;” and yet, if the vassal retaliated upon the lord’s wife, he lost his feud per *feloniam* [o]. And again Struvius informs us, “In dominum peccat
 “vassallus, si dominum cucurbitaverit, five cum ejus uxore
 “concubiverit, vel etiam conatus fuerit turpiter contrectando,
 “vel osculando; hoc tamen non procedit si cum vidua domini,
 “nisi intra annum luctus.” Sir Richard Cox, in his History of Ireland, likewise mentions some very servile and ridiculous customs, which continued in the year 1565; and Blount hath written an express treatise upon what he styles *jocular tenures*.

Fitzherbert, who made his reading upon the fourth of Edward the First, entitled, *Extenta Manerii*, not long after the manumission above-cited, gives us this account of the state of villenage in the reign of Henry the Eighth, and that this kind of tenure began then to decrease in all parts of England: “And in mine opinion villenage began soon after the Con-
 “quest, when the conqueror rewarded all those who came
 “with him in his voyage royal according to their deserts: and
 “to honorable men he gave lordshippes, manors, landes,
 “and tenements, with all the inhabitants, men, women,
 “and children dwelling in the same, to do with them at
 “pleasure. And those honorable men thought they must needs
 “have servants and tenautes, wherefore they pardoned their
 “inhabitants of their lives, and caused them to do all man-
 “ner of service, were it never so vile, and took likewise all

[n] Struvii Jurispr. Feud. p. 541.

[o] The word *felony* in most parts of Europe is only used as synonymous to perfidy: “Felonie est pris pour perfidie, et le seigneur peut le commettre contre son vassal.” Coustumier de Piccardie, p. 102.

"their goods and cattle at their pleasure, and called them
 "their bondmen: and since that time many of *their noble*
 "*disposition* have made to diverse of the said bondmen their
 "manumissions; howbeit in some places the bondmen *con-*
 "*tinue yet.*" Fitz-herbert after this gives it as his opinion
 (agreeable to the recital of the manumission by Henry the
 Eighth), *that no man should be bound but unto God, and*
says slavery is contrary to the principles of Christianity.

After this I find in Rymer a commission of Queen Eliza-
 beth, in the year 1574, directed to Lord Burghley and Sir
 Walter Mildmay, for inquiring into the lands, tenements,
 and other goods, of all her bondmen and bondwomen in the
 counties of Cornwall, Devonshire, Somerset, and Gloucester,
 such as were by blood in a slavish condition, by being born
 in any of her manors, and *to compound with all or any such*
bondmen, or bondwomen, for their manumission and freedom,
 which is perhaps the last mention of this tenure, except ar-
 guments are drawn from old cases in the Year Books; and this
 commission indeed, taken together with other circumstances,
 fully explains why we hear nothing more of this kind of servi-
 tude. The profits of the crown, or the lord of the villyn,
 became now very inconsiderable, as the services could only be
 insisted upon in the spot where he was born. Those who
 have seen day labourers employed in the repair of the highways,
 for which they are to receive no wages [p], may guess in
 what manner these extorted services were performed. At the
 same time the villeyne was willing to pay a considerable fine to
 get rid of this badge of slavery; and the lord was enabled,
 by manumissions, to raise a large sum upon any extraordinary
 emergency: it is therefore not to be wondered at, as the con-
 senting to drop these servile tenures answered the mutual con-
 venience and advantage of both parties, that they soon entirely
 ceased [q]

This

[p] It is most hard and unjust, that the labourer should not be paid, as he re-
 ceives no benefit from the improvement of the roads.

[q] Having had occasion to mention that this servitude prevailed, and continues
 to prevail, in most parts of Europe, I shall cite some passages from Lindenbrogue's
 Collection

This certainly was the principal reason; but other causes concurred. The *Lord*, and *Man of property* began now occasionally to leave his castle or seat in the country, and wanted not only the services of his villey in the demesne lands, but the expence of attending parliament, the court, or his own amusements, required rents payed in money: in lieu of these services the lord was therefore not only willing to commute for money, but likewise to grant long leases, that he and his descendants might have a certain income, whilst the tenant, now having a more fixed and permanent interest in his farm, was both able and willing to improve it. Besides this, we find by the recital of the manumission by Henry the Eighth, and likewise by the conclusion of what Fitz-herbert says, with relation to these tenures in the same reign, that a notion, originally inculcated by Wycliff and his followers, began to prevail, *that it was contrary to the principles of the Christian religion that any one should be a slave*; and from hence, in more modern times, it hath been supposed to be contrary to the common law, which is said to be founded upon Christianity.

Be the law as it may, the persuasion contributed greatly to the abolishing villenage; and the principle, whether a principle of the common law and Christianity, or otherwise, can-

Collection of ancient Laws, which will shew in what light the villeins were considered. In the first place, they could not be witnesses *

“ Si servus servum ictu uno, vel duobus, vel tribus percusserit, *nihil est.*” Inter Leges Ripuariorum.

“ Qui percusserit servum suum, et mortuus erit in manibus, jus erit; sin super-
“ vixerit duo vel tres dies, subiacebit poenæ, *quia pecunia est ejus.*” Inter Capit. Kar. Magni.

“ Constat me vendidisse servum juris mei, non furem, non fugitivum, sed
“ sanum corpore bonisque moribus instructum.” Baluz. vol. i. p. 473. in *formulis Sirmondicis.*

That they had formerly the lowest opinion of this class of men, appears likewise from these two very ancient French verses.

“ Oignez vilain, il vous poindra;

“ Poignez vilain, il vous oindra.” Inst. Coustum.

which we apply to spaniels at present.

* Contemnere fulmina pauper

Creditur atque Deos, Diis ignoscentibus ipis.

Homer indeed gives a better reason for rejecting such witnesses,

Ἡμισυ γὰρ τ' ἀρετῆς ἀποκτείνουσι εὐρύοπα Ζεὺς

Ἀνέρος, εὖ τ' αἶμι καλὰ δέλιον ἥμαρ ἔλθουσιν.

Odyss. P.

not

not be too much commended or insisted upon: I cannot however but think, that neither the Christian religion, nor the common law, ever inculcated or established such a tenet [r].

In the early ages of Christianity, every house was filled with slaves: it was therefore highly incumbent upon those who professed this religion, and were willing to become martyrs in support of it, to have frequently insisted upon what now appears to be the common rights and privileges of humanity. On the contrary, St. Paul writes his Epistle to *Philemon*, expressly to excuse *Onesimus* (*Philemon's* slave), for having run away from his master; and if the whole context is properly considered, no such doctrine is advanced; and it was particularly proper to have laid it down with authority and precision upon such an occasion.

With regard to the law of England on this head, it appears by *Hakluyt* [s], that, in the year 1553, four and twenty negroes were brought into this island from the coast of Africa, and immediately to an English port, as at that time we had no American or sugar trade. These negroes must therefore have been sold in this country; and, if it had been contrary to law, they must have been set at liberty, or the point at least discussed, of which we do not find the least traces; and the question being a great and liberal one, it certainly could never have escaped the notice of Lord Bacon, who would undoubtedly have mentioned it in some of his treatises. Since the establishment of our sugar colonies, modern opinions of great lawyers and (it is believed) decisions of courts of justice, have contradicted this common and prevailing notion, that a negro when BAPTIZED, becomes immediately free [t].

I have

[r] It appears by *Boulainvilliers*, that this question was formerly much agitated in the French courts of justice; but in the *Institutes Coutumieres* (published at Paris in 1679) it is laid down with great precision, that a slave becomes free, as soon as he enters the French territories, and is baptized: "Toutes personnes sont fran-ches en ce Royaume, et sitost q'un esclave a atteint les marches diceluy se fait sans baptizer, est affranchi," p. 2.

[s] Vol. i. part ii. p. 97.

[t] It is laid down, that *trover* will lye for a negro, in 2d Lev. 201. and it seems to be agreed, by two cases in *Salkeld's Reports*, p. 196. that some kind of action will lye for a negro, though not an action of *trover*: I cannot say indeed that

I have been led to this length of observation on the ancient state of villenage, and from what causes this tenure hath now ceased, by the oppressive chapter [u] of the statute against this class of men, and cannot think that a parliament, which could pass so unjust and tyrannical a law, deserved in any respect the appellation of the *Good Parliament*, which Stow informs us it had obtained.

that these cases are well reported, which must not surprize, as Sir Edward Coke asserts, that there are four erroneous cases in that most accurate of all Reporters Plowden, when the whole number contained in his commentaries amounts only to forty-three. Dr. Birch's Coll. of Bacon's Letters, p. 94. I find but one case expressly to contradict this, which is in Russw. Coll. vol. i. p. 312. In the reign of Queen Elizabeth, a slave from Russia was brought into England; and his master insisting upon the power of scourging him, it was held that England was too pure an air for a *slave to breathe in*. This is advanced by the famous John Lilburn, who was most illegally punished; but it does not from thence follow, that all his doctrines were law: a slave may continue in a state of servitude, though he breathes the air of this land of liberty; the law of which will protect him from the too severe punishments of his master, though it may not entirely emancipate him. The term of *slave*, is certainly not unknown in our law, as by 1 Edw. VI. ch. iii. a vagabond and idle servant is to become a *slave* to his master; and the expression is frequently repeated in that statute.

[u] It should seem that this chapter is repealed by a Rich. Stat. ii. ch. ii. but the beginning of it is mis-recited, which is not very unusual in ancient recitals.

STATUTES MADE AT GLOUCESTER.

2 Rich. H. Stat. ii. A. D. 1378.

THE four first chapters of this law relate to trade: the statute recites, that many of the great towns (being probably possessed of absurd privileges by their charters) would not permit any alien merchant to traffick; and therefore enacts, that whoever shall bring by land or sea, wines, *avoir-de-pois*, sustenance, victuals, or other things, shall not be molested, &c. The words *avoir-de-pois* seem unintelligible, I find however (since the former edition), that the word *avoir-de-poids* is used in Joinville's Life of St. Lewis, to signify any commodity sold by weight, and he instances ginger, rhubarb, aloes, and cinamon [w].

The latter part of the chapter mentions cloth of gold and silver, which shews that luxury and trade had now greatly increased; and I should suppose, that the importation of these costly manufactures, was occasioned by the Jubilee in 1376, and fiftieth year of the reign of Edward the Third.

The 5th chapter of the statute is what is generally known by the title *De scandalis Magnatum* [x]. It was certainly occasioned by the defamation of John of Gaunt, by those who supported the lower people and villeyns against the barons; and I have in the observations upon the last law cited a writ from Rymer, which is entitled,

[w] P. 41.

[x] It is said by Sir Robert Atkins, 2 Mod. 161. and Freem. p. 222. that this statute operated only as a promulgation of the common law; and Sir Francis Pemberton, 2 Mod. 164. says, that no action was brought upon it for 100 years or more, after it was first enacted.

Pro Rege Castellæ [y] contra defamationes insurgentium.

The statute likewise recites, that these defamations may be the occasion of disputes between the lords and commons.

It should therefore seem that the law does not extend to the slander of a peer, from which no such terrible consequence can probably arise; especially as the punishment is imprisonment, till the first author of the defamation can be found.

There are some very singular laws of the ancient Burgundians, with regard to abusive words.

“ Si quis alterum *conegatum* [x] clamaverit, 120 denariis mulctetur.

“ Si quis *vulpeculum* alterum clamaverit, vel *leporum*, eodem modo mulctetur.”

These appear plainly to be the laws of a warlike nation, in which the calling another by a name, which implied cunning or flight, rather than courage and resistance, was thought a very heinous injury. One of Alfred's laws is still more severe, “ qui falsi rumoris in vulgus sparsi author est, lingua præcissor [a].”

By the laws of the Goths (whilst in Spain), it is made penal to say of a great man that he is *poderigo*, or gouty; or to omit the proper *cortesia*, or address in a petition or letter [b].

By the 6th chapter (which hath never been translated) it is recited, that great misdemeanors and riots had been committed in the marches [c] of Wales; and particularly, “ quils ravissent dames et damoiselles, et les emmesnent en estrange pais, ou leur plest.” It appears from this,

[y] It is well known, that John of Gaunt had assumed the title of King of Castile.

[x] I choose that the Glossary to *Lindenbrogue* should explain the meaning of this word.

[a] *Thou shalt not raise a false report.* Exod. xxiii. 1.

[b] *Feuro Real de Esp.* 209.

[c] *Marche* is an old English word for a boundary; and hence the German title of *mar-graue*, signifying the governor of a district, which borders on another territory, or what in the old English writers is sometimes called *baseable* ground, i. e. *debatable*. The word *marche* is still used in Scotland, to signify the boundary of a parish.

that a Knight-errant might in some parts of the world be of use as a peace officer. These outrages were generally committed upon the confines [*d*] of two countries, where no regular courts of justice were established for redress of injuries; and we find therefore that the marches, or country between France and Spain, was likewise the principal scene of Knight-errantry.

The earl of Monmouth [*e*] gives us, in his Memoirs, a very particular account of the state of the marches between Scotland and England in the time of Queen Elizabeth; and mentions that one *Giordie Bourne* (a famous moss-trooper) confessed he had murdered seven Englishmen, and ravished above forty women [*f*]. Lord Herbert of Cherbury, likewise, in his Memoirs [*g*], takes notice of the great state of disorder in the Welsh marches in the time of Henry the Eighth; and we find that the Gubbins, or people who inhabited *Dartmore* (separating Devonshire from Cornwall), were *to a proverb* pilferers and lawless [*h*].

That learned antiquary Bishop Nicholson hath published a collection of the laws, which prevailed in the *borders* (as he styles them) between England and Scotland: as for the marches of Wales, they were, from the time of Edward the Fourth, chiefly governed by a president and council, which generally was held at Ludlow, till abolished by the act of King William. There is, in the seventh volume of Rymer, a copy of the instructions to Lord *Compton*, president, and the council of this court, which shew the extensive powers with which it was formerly invested. Gale [*i*] hath given us some instances of the kings of England obliging the inhabitants of the

[*d*] "*Latrocinari extra fines cujuscunque civitatis nulla est infamia.*" Cæsar, *De Bello Gallico*.

[*e*] Carey, Lord Hundson; see his Memoirs, lately published.

[*f*] This famous free-booter was hanged at last for what is called *march-treason*.

[*g*] Which *should* be published.

[*h*] Carew's Cornwall. Nath. Bacon informs us, that anciently there were twelve Lords Marchers, six Britons, and six Saxons; but does not cite his authority.

[*i*] In his Honour of Richmond.

counties adjoining to both the Scotch and Welsh borders, to make good the damages which they might have received by the irruption of the enemy, and upon this principle probably, that they should have assisted more effectually the inhabitants of the marches in their distresses.

[illegible]

Q3 STATUTES

1. The first of these is the fact that the majority of the population of the United States is of European descent. This is a fact which has been recognized by the Government and the people of the United States for many years. It is a fact which has been recognized by the Government and the people of the United States for many years. It is a fact which has been recognized by the Government and the people of the United States for many years.

STATUTES MADE AT WESTMINSTER,

5 Rich. II. Stat. i. A. D. 1381.

TH E statutes throughout this reign continue (in most instances) to be *Capitularia*; yet some of the undigested matter which they contain deserves observation.

The 2d chapter of this law is calculated to prevent the carrying gold, silver, or jewels, out of the realm; and the method which it takes to effectuate this, is of a very extraordinary nature, by enacting, that no one shall leave the kingdom [k], under penalty of forfeiting all their chattles, except *lords*, and other *great persons*, *real* merchants, and the king's soldiers; and not only the person leaving the kingdom is punished by the abovementioned forfeiture, but the master of the vessel is likewise to forfeit his ship.

The law permits indeed not only the king's soldiers to pass without a particular licence, but that money may be exported to pay the wages of the troops at *Calais* [l], and other garrisons in the French provinces. There are earlier statutes than the present to prevent the carrying money out of the kingdom (and we find indeed this same idle apprehension in the laws of other countries); but these laws make no exception with regard to the wages of these garrisons. From hence I conclude, that these fortresses began to be much more consider-

[k] Licences may indeed be procured from certain ports, which are not ranged very geographically; as the statute, after mentioning *Tarmouth*, *Kingston upon Hull*, and *Newcastle upon Tyne* (all of which are on the Eastern coast) says, and other ports towards Ireland. This prohibition of carrying jewels, as well as gold and silver, out of the realm, shews that both trade and luxury had considerably increased; of which Hollinshed gives us another proof in his Chronicle, by mentioning that melons, cucumbers, and many other of the more expensive productions of the kitchen-garden, were very common in the time of Edward the Third, but were soon after almost entirely unknown, till the time of Henry the Eighth; which must have arisen from these elegances being unattended to, during the wars between the houses of York and Lancaster. Hollinshed, vol. ii. p. 205.

[l] Froissart, who wrote part of his History during this reign, speaks thus of Calais, "c'est la ville du monde que la cophmunauté d'Angleterre aime le mieux: car tant comme ils seront seigneurs de Calaix, ils disent qu'ils portent les clefs du royaume de France, a leur ceinture," Froissart, part iv. p. 136.

able than they used to be; as Edward the Third meant something more than an expedition of parade to France, and intended to make a permanent conquest and establishment. We hear indeed often of subsidies for carrying on the war in that country, but this is the first instance of providing a maintenance for a garrison in the French provinces, as before this they were repaired and manned at the expence of the district in the neighbourhood, for the levying of which there are many records in Rymer [m].

The 3d chapter may be styled the first *Navigation Act*, and therefore deserves at least to have been translated; it directs, that, to increase the navy of England (then greatly diminished [a]), no goods or merchandize shall be either exported or imported, but only in ships belonging to the king's subjects.

This excellent law is in part repealed by the fifth of Elizabeth [a], ch. v. which is entitled, *An Act containing politic constitutions for the maintenance of the Navy*: the great policy of which is to oblige every one to eat fish, not for any superstition with regard to meats, but for the increase of mariners: it need not be observed which of the statutes is founded upon the best policy, notwithstanding the pompous title of the latter. In the year 1440, the commons petitioned the king, that no Italian merchant, beyond the freights of Morocco, should bring any merchandize into this realm, except the produce of their own countries, which the king refused his assent to [p]. The Genoese and Venetians were at that time

[m] There are likewise in Rymer, many proclamations ordering sums of money to be raised upon certain districts in England, for the repairing bridges and highways.

[a] I should suppose this decrease (if any) was not very alarming, as it hath already appeared that luxury had made great strides in this country, and that gold and silver stuffs had been imported. The parliament, in the forty-sixth year of Edward the Third, make complaint of the decrease of the navy in these remarkable words: "Item prie la commune que comme les marchantes et mariners d'Angleterre, que 20 ans passés et tout dis a devant, la navie de dit roialme en tous portz et bonnes villes, sur mer et sur ryvers, estoit si noble que tous les pays appelloient notre avandit seigneur le roi de la mer, et tous dotoient son pays le plus par mer et par terre per cause de la dite navie."

[a] A statute of the following year rendered this law entirely ineffectual, by dispensing with foreign ships, if English vessels (proper for the trade) could not be procured.

[p] Cotton's Records.

the common carriers of Europe; and we therefore find, that the parliament, thus early in our history, endeavoured to check the maritime power of the Italian states, and to increase our own navy, by the same methods which constitute the chief regulations of the famous *Navigation Act* of Charles the Second [9], which was calculated to prevent the Dutch from being the common carriers of Europe.

The last chapters of this statute relate to the insurrections under Wat Tyler and Jack Cade; it is recited, that many of the rioters had been executed without due process or trial; but as the [r] intention of those who had been guilty of this infringement of the law was only to put a stop to these dangerous insurrections, the king grants a general pardon to be pleaded against any prosecutions to be commenced, which seems to be a law of as alarming a nature to the liberty of the subject, as can be found in the whole code of statutes; but, having been never translated, it hath escaped the notice of historians, and writers on the law.

The next chapter enacts that all manumissions [s] made during the late riots to villeyns shall be void, as being extorted by violence; and the 9th chapter provides for the deeds which were lost or destroyed during the riots and insurrections; the occasion of which provision arose from the rabble having set fire to the inns of court. As for the last provision, it was necessary, and therefore just; but the making void a

[9] It is an ordinance of the *Commonwealth* re-enacted.

[r] This was chiefly intended for a protection to the Chief Justice Tresilian, who had made a sort of *Jefferies* campaign to try the rioters, according to the chronicle of Henry de Knighton, "Nam quicumque accusatus erat coram eo, in causa supradicta, sive iuste sive ex odio, statim ipsum mortis sententia pledebatur." "Et alios quidem decapitari præcepit, alios autem suspendi, alios vero trahi per civitates, alios autem eviscerari, et viscera concremari coram ipsis viventibus." *Decem Script.* p. 2644. It should seem, however, that this account of Knighton is somewhat aggravated, for he plainly supposes that the punishments arose from the cruelty of the Chief Justice, which were only the common sentence in cases of high treason, for which these rioters were probably indicted.

[s] It appears by one of Pliny's letters, that a Roman slave could not be made free, but by most express words of manumission, "scribis mihi Sabinum (quæ nos reliquit hæredes) Modestum servum suum nunquam liberum esse iussisse, eidem tamen sic adscripsisse, legatum Modesto, quem liberum esse iussi. Queris quid sentiam? contuli cum prudentibus: convenit inter omnes, nec libertatem deberi, quia non sit datus, nec legatum, quia servo suo dederit." Pliny, lib. iv. epist. 10. He very nobly follows, however, the intention of the testatrix.

manumission,

manumission, under pretence of its being extorted, seems to favour of the same tyranny which appears so strongly in the preceding chapter, exempting those from prosecutions, who had executed criminals without a fair trial, and who were therefore themselves the more capital traitors.

STATUTES

STATUTES MADE AT WESTMINSTER,

8 Rich. II. A. D. 1384.

THE administration of justice was very corrupt during the infant king's minority. Besides the proceedings of *Trefilian*, with regard to the trials of the rioters observed upon already, it was one of the articles of impeachment against the archbishop of York, *Robert de Vere*, and *Michael de la Pole*, that they had taken from diverse parties large gifts and presents, in order to procure decisions in the courts of law by their influence over the judges; it is therefore enacted by the 2d chapter of this statute, that no one shall be judge of assise or gaol delivery in his own county [1]. The 3d chapter directs, that they shall not take any reward or present from any one, except victuals or drink, and that of a very small value, which permission was necessary, from the markets in country towns not being supplied as they are at present. The 4th chapter punishes the judge or clerk who shall make a false entry, or erase any part of a record, with fine and imprisonment, and he is moreover to make satisfaction to the party injured by the alteration or rasure. It is remarkable, however, that this satisfaction is only for such a rasure as might be attended with the *disperison* of the parties, from which it may be inferred that personal estate was little considered, as an injury or fraud affecting this species of property seems equally deserving of punishment and reparation.

[1] Du Halde informs us, that no *mandarine* in *China* can decide any law-suit in the province in which he was born; some have thought that this statute should be repealed, as supposing a partiality and bias in the judges: it however relieves them often from a disagreeable situation. By 20 Rich. II. ch. iii. no person of the county, whether *grand* or *petit*, is permitted to sit on the bench with the justices of assise, and probably from the same jealousy; and by the ancient rules of the parliament of Paris, no member of that body may frequent the houses of princes, or go to the Louvre. It is not usual with us at present for the puisne judges to go to court.

The 5th and last chapter explains and limits what actions shall be tried before the constable and marshal, and recites their encroachments upon the common law to be a grievance to the subject [u]. Many causes concurred in making this jurisdiction odious and oppressive. In the first place the proceedings were upon written testimony, always more dilatory, more expensive, and more unsatisfactory, than when the decision depends upon *viva voce* evidence, as it does in a trial by the common law. Besides this, I cannot find that the constable or marshal had a deputy, or judge of his court to assist him, who was versed in the civil law by which the proceedings were to be regulated [w]: the parties therefore were always applying for prohibitions to the courts of common law, and the suit became doubly expensive by being afterwards

[u] The punishments inflicted by the court of the Earl Marshal were often very severe. For example, Hollinshed says, that trumpets were frequently ordered to be dragged at the tail of a boat from one side of the Thames to the other. Vol. 2. p. 185.

[w] The last court held by the Constable for a trial by *duel* was in 7 Charles I, between Lord Rea and Mr. David Ramsden: in the commission there is but one civilian (Sir Henry Martin) who is styled *Judge of the Admiralty*. Russw. Collect. vol. ii. p. 113. The truly learned Dr. Duck was advocate on this appeal. In his treatise *De auctoritate juris civilis*, he speaks thus of the court of the constable and marshal: "Cognoscunt constabularis et marescallus in curia militari de criminibus perpetratis extra regnum Angliæ, de contractibus factis apud externos, et de rebus quæ ad bellum et arma spectant, sive in regno Angliæ sive apud externos."

"Si Anglus Anglum accuset de crimine læsæ majestatis commisso extra Angliam, agit coram constabili et marescallo, et probatio fit per testes, vel ex antiquo hujus curiæ more per duellum. Si subdime regis nostri occidat alium regni subditum in Scotia, vel alibi apud externos, de hoc non potest agi in curiis juris Anglicani, sed coram constabili et marescallo, nec de his etiam in parlamento agi potest. Ideo cum Franciscus Dracus, in re navali apud nos celeberrimus, capite multasset Dourishium in America anno xxv D. Elizabethæ, ejusque cædis vindictam Dourishii frater et hæres a regina peteret, iudices regi de hac re consulti responderunt, de hoc crimine posse agi solum coram constabili et marescallo, et, regina ex gravibus causis constabilem constituere recusante, accusatio evanuit. Et cum nuper Wilhelmus Holmestus Anglus gladio occidisset Willielmum Wiscant Anglum in insula Terra nova in America anno mdcxxxii: annoque sequenti vidua Willielmi Wiscæ a serenissimo rege Carolo ad accusationem de mariti cæde admitti peteret, nobilissimus Comes Lynseius pro ea causa sola constabularis Angliæ constitutus, et Comes Arundellus, Comes Marescallus Angliæ, condemnarunt sententia, in curia militari publice lata Holmestum, mense Aprilis anno mdcxxxiii, ad poenam capitalis, quanti subisset, si rex eidem criminis absolutionem ex gratia non indulgeret. Si Anglus in Gallia lethale vulnus inferat Anglo, ex quo in Angliam rediens, moriatur, contra eum non ex jure Anglicano, sed tantum in curia militari agi potest. Ne licet aliqua statuta recentiora cognitionem criminum læsæ majestatis in aliquibus causis triquant iudicibus banci regis, aut commissariis regni, per ex tamen jurisdictionis constabularis et marescalli tolli non intelligitur."

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drawn *ad aliud examen*. This court hath scarcely a cause at present, the business having been greatly diminished by the loss of the French provinces, as the jurisdiction chiefly took place in contracts entered into out of the king's English dominions; and as for the trial by duel, the last instance is that of Lord Rea and Mr. David Ramsden, when the court was held by the earl of Lindsey then Constable of England, and the earl of Arundel as Earl Marshal of England [x].

Rushworth informs us, that the Lord Marshal spoke in defence of the court of chivalry, and the manner of proceeding therein according to the custom of arms: "That in these latter ages the trial by duel had indeed been not frequently used, but that this was to be attributed to the good government of the kings of England; and added, that it was an error to apprehend that, as soon as an appeal is brought, it was presently to be decided by duel; whereas duelling *was the ultimate trial of all others*; and even then it was in the arbitrement of the court, whether it should be granted or not." After this follow all the proceedings in this appeal; and it is remarkable, that the defendant Ramsden, in his answer, alleges that the bill and appeal [y] *was and is false*, and that the appellant Lord Rea *did lye falsely*, which accounts perhaps for the *lye direct* being always followed by a duel even to this day.

I have had occasion on the statute (*incerti temporis*) *de magnis affis et duellis*, to mention a reason which might have reconciled this extraordinary kind of trial in some measure to ideas of justice, and, at the same time, took notice of an instance (from Grafton's Chronicle) which must have made it infinitely ridiculous. There are not wanting circumstances of ridicule in the very minute account, which Rushworth gives us of this intended duel between Lord Rea and Mr. Ramsden.

[x] The title of this chapter of the statute is, *What suit shall be discussed before the Constable and Marshal of England*; and hence one of the great arguments in Dr. Oldys's case (reported in Shower's Parl. C.) is, that the court cannot be held but before both of these great officers. It being a parliamentary decision, it is impossible to know what weight this argument had in the house of lords.

[y] The appeal is brought against Ramsden for having had treasonable intentions.

The court, upon the petition of Lord Rea, permits him to have (whilst in the lists) *counsel*, and a surgeon with his ointments. They likewise permit him to have a seat, or pavilion, to rest himself, and wine for refreshment [z]; he is allowed besides, *iron nails, hammer, file, scissors, bodkin, and needle and thread*. After two or three adjournments, the king superseded his commission to the constable and marshal, and so ended the last of these absurd trials on an appeal of treason.

After this we find, in the same volume of Rushworth, an account of a duel in a writ of right, which was ordered before Judge Berkely, in the county of Durham, between Ralph Claxton demandant, and Richard Lilburn tenant, on the 6th of August, 1638. As there had been no instance of such a duel for many years before, the king, by an order of council, refers it to the judges of the Northern circuit to consider how this duel might be avoided, but with an intimation that he would not deny this method of trial, if it could not be legally prevented. Both parties, however, on the day appointed, brought their champions into court with their *battons* and *sand-bags*; but the court, upon reading the record, found an error in it, committed by a mistake of the clerk [some said wilfully done (a)], on which the court would not let the champions join battle. Rushworth likewise gives us the opinion of the judges previous to this. “The tenant
“waged battle, which was accepted, and at the day to be
“performed. Berkely justice then examined the champions
“of both parties, whether they were not hired for money?
“And they confessed they were; which confession he caused
“to be recorded, and gave further day *to be advised*: and,
“by the king’s directions, all the judges were required to
“deliver their opinions, whether this was cause to *dearraign*
“[b] the battle by the champions: and the judges held,

[z] It was this indulgence of wine that occasioned the death of the poor citizen, as the story is told by Grafton, he having made too free an use of this kind of refreshment.

[a] If it really was wilful, this does not seem *impeachable* either in the judge or clerk.

[b] *Derefnier*, in the old Norman French, signifies to deny, or refuse. *Coustume reformee de Normandie*, vol. i. p. 107.

“ that

"that this exception, coming after battle gaged, and champions allowed and sureties given to perform it, ought not to be received."

As this last instance of a duel between champions on a writ of right seems to have given so much trouble to the king, judges, and parties, and was at last prevented by a wilful mistake in the record, it seems extraordinary that this absurd method of trial should not have been abolished by act of parliament; but, if there is any such statute, it hath escaped me, nor can I find such a reference in the common Indexes.

A S T A-

A S T A T U T E

Made 10 Rich. II. A. D. 1386.

THIS statute, after a short writ to the sheriff with directions to proclaim it as an act of parliament [c], consists merely of a very long commission to the dukes of Gloucester and York, the chancellor, and others, to examine into the state of the king's courts, revenues, grants, and officer's fees, with this most extraordinary and illegal power, *to determine and regulate as they shall think proper where no remedy is given by the common law.*

Dr. Brady, in the third volume of his History, informs us, that, at the close of the parliament roll of this year it is entered, that "the king made open protestation with his mouth, that nothing which had passed during that session should prejudice either himself or his prerogative:" which curious particular is confirmed by the recital of 21 Rich. II. ch. ii. which repeals the above mentioned most unconstitutional commission, and which recites, that it was *extorted* from the king by the duke of Gloucester and the earl of Arundel, who sent a great personage [d], to deliver this message to him, "that, if he would not give his assent to the *commission*, he would be in *peril of his life*." Carte, in his History, hath endeavoured to establish the courage and

[d] This parliament is, by some of the old historians, styled the *parliament which wrought wonders*, and by others, the *merciless parliament*, which last appellation they seem by this law to have best deserved.

[e] "Un grant person, pier de la terre," in the original French, and this statute hath never been translated. I should imagine that this expression of *Pier de la terre*, or, as we sometimes say at present, *Peer of the land*, was originally used to distinguish a peer of England, from the *Pairs* or *Peers* of the French provinces, who were frequently employed by the kings of this country, before we had fortunately lost these very inconvenient appendages.

martial spirit of this weak king; an attempt very similar to Dr. Myddelton's in making a general of Cicero; the permitting of this recital, in an act of parliament, seems to be a very complete refutation, if such was requisite.

STATUTES

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STATUTES MADE AT WESTMINSTER,

13 Rich. II. A. D. 1389.

THE 5th chapter of this statute regulates in what things the *admiral and his deputy shall meddle* [e]. The encroachments of the admiral's [f] jurisdiction seem to be a natural consequence of those of the constable and marshal complained of before. One great office is very apt to follow the example of another which claims extraordinary privileges, especially if they have been asserted for some time with impunity, and derogate from the common law. *Argue not the use* (as *Lear* says,) it is sufficient that it is called a *privilege*, and that it makes a distinction between any person in office and the other members of the community in which he lives; and if it is not only useless, but highly inconvenient and expensive, it seems rather to add to the obstinacy and warmth with which it is claimed and insisted upon [g].

Judge Howton (in Brownlow's Reports) says, that the intent of this statute was not to prevent the admiral's court from holding plea of any thing beyond sea, but only of things happening within the realm contrary to the common law; and it is very remarkable, that in all the disputes between the court of admiralty and those of the common law (some of which produced solemn and elaborate arguments before the

[e] By deputy is meant the judge of the admiralty: there is a very able argument of Sir Leoline Jenkins on this statute before the house of lords, in answer to Lord Chief Justice Vaughan. Wynne's Life of Sir L. Jenkins, vol. i. p. 78. There is likewise a manuscript treatise of Lord Chief Justice Hale, *De jure Maris, et Brachiorum*.

[f] Popliniers, in his *Admiral de la France*, says, that the word *admiral* is by no means confined to signify a sea officer; and he cites Monstrelet's Chronicle for making use of the term *amiral des arbalestriers*. It appears also by some verses of *Eustache Deschamps*, who wrote in the time of Charles the Sixth of France, that there were then knights in the sea service, as well as in that of the land,

"Bons sont les Chevaliers de terre.

"Bons sont les Chevaliers de mer."

[g] The exclusive jurisdictions in many corporations are both highly inconvenient and expensive to those who claim such a privilege; it is believed however, that there hath never been an instance of an application from a corporation to be considered as part of the county, in which the town is situated.

king in council) nothing is ever even dropt with regard to the admiral's warrants in pressing [b], which is well known to be the most oppressive hardship which an Englishman is still obliged to submit to, in this otherwise free country, and a hardship which necessity alone can justify towards those, to whom we owe our national power and importance, and on whom we must rely for their continuance. I do not mean by this to intimate that the pressing mariners is not supported by usage and precedents, as far back in our history as records can be found, many of which are referred to in the case of *Alexander Broadfoot*, who was indicted for murder at the gaol delivery for the city of Bristol in 1743, and whose defence was, that he acted under the authority of a pressing warrant from the admiralty [i]. Mr. Justice Foster, who at that time was recorder of Bristol, hath published a very able and elaborate argument in his Reports on this head, and hath supported the opinion which he then gave, by authorities chiefly from Rymer's most valuable collection. As the law in these great constitutional points arises from such precedents, it seems to be an omission, if the whole record (provided the length be not very great) is not printed together with such argument, or treatise, as an abridgment often mistakes or misleads; and few will take the trouble to examine the original.

In the first record which is cited, the *most material part*, to prove the power of pressing, is not stated. The commission is in the twenty-ninth year of Edward the Third, and it is thus abridged: "William Barret, commander of the ship *Julian*, "had a commission to make choice, and take up in the "counties of Kent, Essex, Surrey, and Sussex, thirty-six "mariners, and put them on board his ship, in order to pro-

[b] This word was anciently spelt *impressing*, and consequently being derived from the French word *empresire*, seems to imply a contract on the part of the seaman, and that he cannot be compelled to serve. Sir Edward Coke hath somewhere observed upon the law maxim, "*that the king is entitled to every man's service*;" to which he adds this restriction, that the subject must be employed within the four seas: it is very extraordinary, that the case of the seaman, being perhaps sent to the antipodes, should have then escaped him; the reason of this seems to be, that there was not often occasion formerly to send them (in the service of the government) on distant voyages.

[i] Broadfoot had not the proper officer with him, according to the directions of the warrant; he was therefore found guilty of man-slaughter.

"ceed with the prince of Wales, on an expedition to Gafcony." Upon examining the original in Rymer, after this follows: Et ad omnes quos in hac parte *contrarios invenerit*, "*seu rebelles, capiendum, et prisonis nostris mancipandum, et in eisdem moraturos, quousque de eisdem aliter duxerimus demandandum [k].*" I must likewise take the liberty to say, that some authorities relative to the power of pressing have escaped the learned judge, which I have happened to meet with, though not after making searches with regard to this particular question.

And first with regard to the power of pressing for the land service, of which there were formerly precedents [l], and even

[k] The most general pressing warrant which I have happened to meet with, is in Carte's Rolles Gascognes, tom. ii. p. 151. it is thus entitled, "De omnibus navibus, et marinariis de admiratu occidentali arrestandis, in resistentia inimicorum Franciæ, qui se parant tam ad villam *Calestæ*, et alia castra ibidem obfidendam, quam ad regnum Angliæ invadendum."

[l] There is, in Carte's Rolles Gascognes, a record thus entitled, "De miniatoribus *arrestandis*, ad deserviendum Domino regi," p. 276; and it appears by the title of another record, p. 153, that these miners were generally taken from the *Forest of Dean*, having been probably employed in the collieries there. We hear indeed little of these or other mines so early in the English history. I have likewise, in the observations on the third of Henry the Sixth, had occasion to take notice of a commission empowering the pressing as many labourers, as should be thought necessary to assist in the works carried on in *Lyndsey Hundred* (in Lincolnshire) to keep off the sea. There is also, in Rymer, a writ of Henry the Sixth, to empower certain persons to press *minstrels in solatium regis*; those who were the objects of this very singular press-warrant (if I may so term it) did not probably dispute the authority: it remains however an instance of the extraordinary powers assumed, though by a weak king,

"De ministrallis propter solatium regis providendis.

"Rex dilectis sibi Waltero Haliday, Roberto Marshall, Gulielmo Wykes, et Johanni Clyff, sal.

"Sciatis quod nos, considerantes qualiter quidam ministralli nostri jam tardè viam universæ carnis sint ingressi, aliisque loco ipsorum propter solatium nostrum de neceesse indigentes, assignavimus vos ad quosdam pueros *membris naturalibus elegantes*, in arte ministrallatus instructos, ubicumque inveniri poterunt, tam infra libertates quam extra, *capiendum, et in servitio nostro ponendum.*" Rymer, 34 Hen. VI.

It is very difficult to say, what was the business or science which these minstrels professed: by the expression of *membris elegantes* one should conceive they were dancers; by another record in Rymer, however, of the ninth of Edward the Fourth, *Haliday, Cliff, and Marshall*, together with others, are erected into a gild, or fraternity; and certain women are likewise associated in this new corporation. By part of this record it is recited to be their duty to sing in the king's chapel, and particularly for the departed souls of the king and queen when they shall dye. I find however (since the former edition) the following passage in Joinville's Life of St. Lewis, p. 117, which shews that these minstrels were tumblers, or posture-masters.

so late as the reign of Queen Elizabeth. Stowe mentions, that, in the year 1596, a thousand men were pressed for the land service: they were afterwards indeed discharged, instead of being sent to France as intended; and the chronicler, who states the fact (and which happened in his own time), does not even hint at a doubt about the legality of this measure [m]. It is likewise asserted in Rushworth's Collections [n], that the power to *press soldiers* is not to be disputed. There is also an ordinance of the commonwealth (in Scobell's Collection), which throws light upon this point, and shews the apprehension of what was supposed to be law at that time. The ordinance is of the year 1648, and is entitled, *An Ordinance to encourage Mariners and impress Seamen*; the last clause of which is as follows: "And lastly, for the better
 "encouragement of seamen and watermen to apply themselves
 "the more willingly to this service, it is further enacted or
 "ordained, that all mariners, sailors, and watermen, who
 "have served an apprenticeship of seven years, shall hereby
 "be exempted and freed from being pressed to serve as soldiers
 "in any land service."

With regard to the power of *pressing mariners*, Rushworth gives us this account of the temporary act of Charles the First [m] for this purpose. Resolved by the House of Commons,

"Avec le Prince vinrent trois *menestriers*, de la grande Hyermenie *, et estoient freres, et en aloient a Jerusalem en pelerinage, et avoient trois cors, dont les voix des cors leurs venoient parmi les visages—Quand ils encommenceoient a corner, vous disiez que ce sont les voix des Cygnes, qui se partent de l'estanc, et sefoient les plous douces melodies, et les plus gracieuses, que c'estoit merveille de l'oyr. Ils sefoient trois *merveilleus saus*, car on leur metoit une touaille desous les piez, et tournoient tout debout, si que leur piés revenoient tout en estant sur la touaille: les deux *tournoient les testes arrieres*, et l'aïne aussi, et quant on li faisoient tourner la teste devant, il se seignoit, car il avoit paour que il ne se brisast le col au tourner."

As what relates to the *cors* or *borns* may not perhaps be easily understood by the reader, I take the signification of that part of the citation to be, *that they imitated the sound of horns with their mouths.*

[m] Stowe, p. 769. This extraordinary and illegal power was assumed by Queen Elizabeth at the latter end of her reign, when from year to year she seemed more determined to convince her subjects, *that she was the daughter of Henry the Eighth.*

[n] Rush. vol. iii. p. 77. in append. The passage is taken from an argument of Mr. Mason of Lincoln's-Inn, 4 Charles I: it need not be here observed, that there is no such power to impress soldiers at present.

[o] 16 and 17 Charles I. ch. v. 23 and 26. Rushworth, vol. v. p. 261.

[p] Part ii. p. 26.

that there should be a bill to *empower pressing for the sea service for a certain time, the house being very tender of bringing the way of pressing into example.* Nath. Bacon, on the other hand, in his chapter on the Admiral's Court [p], says, that the lord admiral hath power not only over the seamen serving in the ships of the state, but *over all other seamen, to arrest them for the service of the state*; and, by 13 and 14 Geo. II. ch. xvii. it is enacted, that no person may be pressed under the age of eighteen, or above the age of fifty-five, which seems by implication to authorize the pressing of those who are between those ages.

I have thought it not improper to state these authorities with regard to the great constitutional question of pressing, as the argument of Mr. Justice Foster is the only treatise to be found in the law-books on this subject, and which is, by many, conceived to have exhausted all the learning and authorities on this head. Should this point be ever agitated in a court of justice, he who makes a diligent and judicious search, need not despair of finding many fresh materials; and the silence of the common lawyers [q], with regard to these admiralty warrants, seems to be one of the strongest proofs in support of their legality, as well as the silence of the preambles to the statutes, which recite the encroachments of the admiral's jurisdiction.

[q] Lord Clarendon (in the lately-published Continuation) mentions the practice of pressing, without any kind of reflection or doubts of the legality of it.

STATUTES MADE AT WESTMINSTER,

[r] 20 Rich. II. Stat. i. A. D. 1396.

I HAVE before observed, that the statutes throughout this reign continue to be *Capitularia*: the three first chapters afford likewise an additional proof of the turbulent state of the times and the great abuses in the administration of justice. We find in Rymer, as a prelude to the meeting of this parliament, an order from the king to his uncle the duke of Lancaster (who was unpopular from his oppressions to the villeyns), to raise 300 armed men, and sixty archers, for his protection during this session.

The first chapter enacts, that no one shall ride armed with a *lancegaye*, which therefore must have been a weapon of which a very improper use might be made in a country now disturbed with every kind of riot and disorder. It is likewise afterwards enacted, that no one shall carry *palet*, *ne chapelle de fer*; and that the statute of *Chaperons* made in the first year of this king's reign, shall be put in execution. The word *palet* is translated *fallett*, which conveys no idea whatsoever; the French Dictionaries render the word *palet*, by that sort of instrument which the surgeons use in making plaisters; this weapon therefore must have resembled the form of that chirurgical instrument. As for the word *chaperons*, it is most improperly rendered *bats*, as they were not known or used at this time; and the statute alluded to is the 7th chapter of the first of Richard the Second, by which no one is permitted to wear the livery

[r] Grafton, in his Chronicle, says, that Richard the Second granted the effects of the deposed archbishop of Canterbury to his successor, on condition that he complied with the statutes made in the twenty, and twenty-first year of his reign at *Shrewsbury and Coventry*. We must however suppose the parliamentary roll to be more accurate, which states this parliament to be held at *Westminster*, now become almost the only place which had proper accommodations for the reception of so numerous an assembly. Grafton, p. 8.

[*s*] of another by the name of *chaperon*, which signifies a hood.

It may perhaps appear too minute to dwell upon the meaning of such words in an ancient law: if they are printed however in our code of statutes, it is certainly proper that they should be understood. Ignorance of terms used in records and books of antiquity, seems to have occasioned the word *escuage* or *scutage* (in every one's mouth who looks into the early parts of our history) to be entirely misapprehended. This is always supposed to be derived from *scutum*; and therefore the meaning affixed to this term, is a tax payed in commutation for providing a soldier with this kind of defensive armour [*t*]. The greater part of the ancient armies by no means consisted of troops thus armed [*u*]; they had neither the practice nor habit which the Roman soldier was enured to, of marching under such a weight, nor could carriages be provided to relieve them from this incumbrance. In *Wachter's* Glossarium Germanicum [*w*], the word *schutz* or *schütz* is rendered *sagittator*, in the Anglo-Saxon it is *scytta*, in the Belgic *schutten*, and in English *shooter*. The *scutarii* therefore signified only archers, whose arms were light, and could be easily carried by the soldiers on a march. It is well known that the English were famous for their skill in archery [*x*]; and hence we hear so much in the very early part of our history of the *scutagium*.

[*s*] There are laws against the wearing of liveries in most of the countries of Europe, in order to prevent dangerous combinations: by the laws of Macbeth, it is even made capital. Hollinsh. Transl. of Heslor Boethius, p. 171. If the officers of the new-established militia should look upon themselves as a distinct body from the other inhabitants of the county, there are few points which might not be carried by such an association of men living often together, and wearing the same uniform, which unaccountably cements the union.

[*t*] "*Gunterius* uses *clypeus* for a shield, instead of *scutum*, and from this shield I say it might well be called *scutagium*; as also from the service being performed "*cum basta et scuto*." Rel. Spelm. p. 37.

[*u*] The officers might be armed in this manner, and perhaps some other select corps. If these shields had been commonly used, we should find them buried in every field, and great numbers in every old-castle; a man of consequence indeed hath such a shield often on his tomb-stone in times of antiquity; but the common soldier had not the means of procuring so burthenome and expensive a defence.

[*w*] Printed at Leipstick in 1757.

[*x*] *Roger Ascham* (in his *Toxophilus*) says, that archery was first introduced by the Saxons in the time of *Vortigern*, which is an additional proof that we must have recourse to the German language for the meaning of this word.

The 2d chapter forbids the yeomanry's [y] wearing the livery of any great man's band [z], "s'il ne soit menial et familier, ou officer continuel." And the 3d forbids any one sitting on the bench with the judge of assize, which joined to the following chapter, with regard to liveries, shews the influence that was supposed to be used with the judges of those times.

These judges, viz. *Tresilian*, *Belknap*, *Holte*, and *Bourghes*, are names long since branded, and infamous in our annals: the three last of these are permitted, by the 5th chapter of this law, to return from their banishment in Ireland, notwithstanding the statute of the eleventh of Richard the Second [a]. We find likewise that the next year the legislature reversed the sentence against Michael de la Pole (earl of Suffolk), who had acted in consequence of *Tresilian* and *Belknap*'s opinion, which is declared to have been a good and legal one. I cannot therefore but think that much injustice hath been done to the memory of these two judges, by the chroniclers writing with a strong bias of party, which is but too common with English historians. We have indeed the questions themselves, with the opinion of these judges [b], amongst the statutes of the next year; and Henry de Knighton [c], who hath inserted the same questions [d] and answers in his

[y] This chapter of the statute hath not been translated; the expression in the original is *vadletz, ou yomen*. *Borel* (in his Glossary) says, that the word *valet* anciently was applied to the king's eldest son; and hence the *valet*, or knave, follows the king and queen, in a pack of cards.

[z] In the original, "liverie de compagnie d'aucun seigneur." I have already observed upon the signification of the word *seigneur*.

[a] I have looked into this statute, which is a very long one, but can find no name but that of *Tresilian*; this recital is therefore either inaccurate, or the eleventh of Richard the Second is not completely printed.

[b] Given at Nottingham in the eleventh year of Richard the Second.

[c] Knighton was strongly biased in favour of the duke of Gloucester, against the earl of Suffolk and the judges.

[d] Hayward, in his Life of Henry the Fourth, says, these queries were drawn up by a barrister, whose name was Blake. Skelton is another barrister, mentioned in the 12th chapter of the twenty-first of Richard the Second, and is described as *apris de la ley*, or "learned and versed in the laws," which makes it possible, that the word *apprentice* of the law may have been an erroneous manner of filling up the contraction *ap. de la ley*, which meant, perhaps, *appris*, and not *apprentice de la ley*. It is not probable likewise that the law, which was so liberally professed in England, and which had such noble establishments, according to Fortescue's account, should have borrowed, for one of their degrees in *science*, a term of *mechanics and trade*.

Chronicle,

Chronicle, gives us at the same time the following introduction to them [e].

The parliament of the twenty-first [f] of Richard the Second was the last held during his unfortunate reign. As he was a weak prince, and entirely governed by the factious ministers to whom he abandoned implicitly the care of all public affairs, it is impossible to form any idea of his merits or demerits as a legislator; and he hath permitted the preamble of one of the statutes of his reign [g] to inform posterity, that a message brought by a single peer (attended with menaces) was sufficient to deter him from his most settled purposes. He suffered in the public opinion not only from his own weaknesses, but from the comparative lustre of the characters of his father, and grand-father. This prejudice went so far, that it was insinuated that he was not the real son of the *Black Prince*; and, if the picture which hangs near the pulpit in Westminster-Abbey is really an original (as supposed by some) he certainly had not the complexion of his father, as I am persuaded

[e] "Post hæc rex venit per *Notyngbam* rediens de partibus borealibus, et tenuit apud *Notyngbam* concilium in crastino Sancti *Bartholomæi*. In quo affuerunt quinque nephandi seductores regis, scilicet *Alexander Archiepiscopus Eboracensis*, dominus *Robertus Ver Dux Hiberniæ*, *Michael de Pole Comes de Suthfolk*, *Robertus Treslylen* justiciarius, *Robertus Brembylle*. Justiciarii quoque omnes regni iussi sunt ibidem concurrere; dominus *Willielmus Skipwith* non erat cum eis, infirmitate detentus. Tunc iussi sunt justiciarii sigilla sua apponere ad infra-scriptas questiones, ut exinde seductores sæpediti caperent occasionem occidendi ducem *Glocestriæ*, et omnes reliquos qui in ultimo parlamento constituti sunt ad gubernationem regis et regni, et omnes in parlamento eis consentientes in hac parte. Quidam de justiciariis renuerunt sigilla sua apponere, sed hoc facere artati sunt. Dominus *Johannes Belknappe* justiciarius cum multa instancia renuit. Sed *Dux Hiberniæ* et *Comes de Suthfolk* compellebant eum ad hoc faciendum; nam si non fecisset, minabantur ei mortem, et manus eorum (ut sibi videbatur) non evasisset. Cumque sigillum suum apposuisset, ait, Jam, inquit, mihi non deest nisi ratis, equus, et funis, ut dignam mortem sustineam: si vero hoc non egissem, mortem manus vestræ sustinuissem. Et quia voluntatem regis et vestri jam adimplevi, mortem prodicionis erga magnates regni merui; unde in proximo parlamento sequenti cum sociis morti adjudicatus est, ut patebit." Many other curious anecdotes with regard to Tresilian and Belknap may be found in the *Decem Scriptores*, p. 2693, & seq.

[f] Sir Robert Cotton (in his *Posthuma*) mentions a statute which passed this year, "that whatever escheats to the king shall not be disposed of, and that the procurer of any such grant shall be punished by fine and imprisonment." Cotton, p. 170. We find no such law however in the *Statute-book*. All the proceedings in parliament of the twenty-first of Richard the Second are repealed by the first of Henry the Fourth, and the eleventh of Richard the Second is re-enacted.

[g] 21 Rich. II. ch. ii. already observed upon.

ed he had the appellation of the *Black Prince* [b] from his dark hair, and not from the colour of his armour. The resemblance in point of feature and complexion is more to be relied upon, in proof of legitimacy, than any hereditary qualities of the mind, notwithstanding we are told, that

Fortes creantur fortibus, et bonis,

which we find contradicted by the instance of Edward the Second, as well as that of Henry the Sixth. I had almost said, that it is providential for the liberties of a free country, that there should not be a long succession of great and able kings. If this consequence should not be apprehended by many, it must however be admitted, that it is providential for the general liberties of Europe, and mankind, as it would be impossible for any alliance or confederacy to resist such an increase of power in a particular state.

[b] I have some where read a passage in one of the old Chroniclers, where he is styled the *Black Prince*, before he had distinguished himself in arms: besides this, all princes and generals wore the same armour for the greater part of their campaigns, and yet we never hear of a *Blue* or a *Red Prince*. To which it may be added, that in England, where he seems to have obtained this appellation, he could seldom have had occasion to wear armour of any colour.

STATUTES

STATUTES MADE AT WESTMINSTER,

1 Hen. IV. A. D. 1399.

THE new king's reign opens with a statute which consists of twenty chapters; two of these, viz. the 6th and 13th, relate to the improvement and care both of the landed revenue of the crown, as well as the customs. The first, which directs, that, upon application for any crown lands [i], the petitioner must set forth the real value, or otherwise the grant to be void, was probably occasioned by some very improvident grants of Richard the Second, either during his minority, or when, by his distresses afterwards, he was not in a situation to resist the application of those to whom he was in reality a prisoner [k]. Henry might indeed have revoked such grants, but his title to the crown was far from being a good one, and his situation in every respect very critical; it would therefore have been highly impolitic to have raised new enemies, and disturbed the grantees possession, though obtained by improper suggestions. The regulation to prevent such imposition for the future seems to be a very wise one; and as I do not find that the act hath been repealed [l], it seems well to deserve the attention of the Treasury at this day, though subsequent statutes have made considerable alterations with regard to the grants of crown lands.

The 13th chapter, which relates to the customs, seems likewise well to deserve the attention of the same board, as this statute likewise continues unrepealed, and enacts, that the comptrollers and searchers of the customs shall be resident in person at the port, without making any *deputy* (or *lieute-*

[i] This is followed by a very singular statute of the next year, declaring that the king will make no grants of lands but to those *who shall deserve them*; and if any one applies not having deserts, he may be punished at the king's pleasure. This law, if in force, would greatly lessen the number of applications.

[k] Henry himself must likewise have been much solicited for grants of forfeitures by those who had supported his cause.

[l] It is much weakened by an explanatory statute of the following year.

nant) to execute their office [m]. This abuse of turning the custom-house offices into *sine-cures*, had begun to prevail in the reign of Edward the Third; for, by the grant of the office of comptroller of the port of London to the Poet Chaucer [n] (and no one hath so good a claim to ease and *sine-cures* as poets), there is an expresse condition, that he shall not only reside, but make all the entries with his own hand. I believe it will not be easy to find such a condition in a modern patent, as Treasuries either know nothing of this law, or otherwise choose to be ignorant of it.

The 20th and last chapter contains a general pardon, which, amongst some other exceptions, does not extend to a person *pris ove meynovere* [o], which is what anciently was said by the crown lawyers, "to be caught in the *mainer*." As there was formerly a distinction between a murder openly perpetrated [p], or in a more concealed manner (the word *murdrum* signifying only the latter, or the fine imposed on the township when the concealed murder was not discovered); so there was a distinction made between a robbery or larceny, where the thing stolen was found in the criminal's hand, and where the proof depended upon other circumstances not quite so irrefragable. The former properly was termed *pris ove meynovere*, as in the present statute, and not *ove mainer*, or *mainour*, as it is generally written; and the signification is *holding in his hand* [q], or detected with the thing stolen in his hand.

This seems likewise to be the meaning of the words *infangthef* and *utfangthef*, in grants of jurisdictions. The *Regiam Majestatem* speaks thus of such courts, "*quædam placita criminalia pertinent ad quosdam barones, maxime qui habent et tenent curias suas cum focco et sacca, furca, et fossa, infangthef et utfangthef.*" Now I should apprehend (though the Glossaries do not support the conjecture) that *infangthef* means exactly the same with the word *meynovere*, and

[m] The officer's being able to pay a deputy out of his fees seems to prove a considerable increase of trade.

[n] Rymer's Feed.

[o] This chapter hath not been translated.

[p] By the old Scotch law, a murderer thus detected is said to be apprehended with the *reid band*.

[q] It is called, by Bracton, *bondaband*, which amounts to the same, or *having in the band*. Cotgrave says, that *malnouvrer* is an old Norman word for *holding*.

signifies

signifies the *furtum manifestum* of Bracton, or the thief apprehended with the goods stolen in his hand, as *fang* is a Saxon word for the *fiſt* or *hand* [r]. Some of the writers upon the old French law (if my memory does not fail me) ſtile this detection of the thief *pris en poigne*. The inferior jurisdictions had conuſance of this crime, when the proof of guilt was irrefragable, and beyond a doubt; but where the proof depended upon a long ſeries and chain of circumſtances, the criminal could only be tried before ſuperior judges, and in ſuperior courts.

[r] *Infangtheſ* and *utfangtheſ* will therefore ſignify a jurisdiction of trying every kind of larceny, whether the thief be detected with the thing ſtolen either *in* or *out* of his hand.

STATUTES

STATUTES MADE AT WESTMINSTER,

2 Hen. IV. A. D. 1400.

THE 15th chapter of this collection of statutes is the first law that makes the offence of *heresy* capital, which was either before this unknown, or the punishment left to the censures of the ecclesiastical courts [s]. Holinshed [t] informs us, that Henry himself was rather inclined to favour Wycliff, and the new Reformers; and Grafton [u] mentions his having said, whilst he was earl of Derby, that *princes had too little, and religious houses too much*; which unguarded expression is said to have occasioned one of the rebellions during his reign. The king had been, in the early part of his life, a prince or soldier of fortune, and seems to have had rather libertine principles; he was now however advanced in years, and, having a very questionable title to the throne, was by no means in a situation wantonly to make so powerful a body his enemies [w]. This 15th chapter is the only one in the statute which is in the Latin language, and directs, “all heretical books [x] to be brought to the Ordinary; that no one shall presume to preach without his licence: that, upon suspicion of heresy, he may imprison and interrogate the heretick: and, upon conviction and refusing to abjure his heresy, that he shall

[s] By 5 Rich. II. ch. v. the sheriff is empowered to apprehend *public* preachers of heresy, but no punishment is specified.

[t] P. 511.

[u] P. 11.

[w] Bishop Burnet, in his History of the Reformation, says, that Henry the Fourth, in gratitude to the clergy who had raised him to the throne, granted them this law to *their heart's content*, vol. i. p. 24.

[x] This must probably have been aimed at the books of Wycliff, the principal of which, we find by Rymer, was entitled *Dialogus*: those who may have curiosity to examine further into his doctrines, will find them fully stated in the Decem Scriptores, p. 2648.

“ be delivered over to the secular arm, which is to inflict the punishment of burning, *coram populo, in emnente loco* [y].”

It is a well-known rule in the construction of statutes, that the best key to the understanding of them is to enquire what was the established common law before the new parliamentary regulations take place. There is, in the appendix to the sixth volume of the State Trials, a short treatise concerning the ancient method of proceeding against Hereticks in this country, whom the ingenious author supposes to have been punished capitally. I must beg leave to question this opinion however, as well as the manner of his considering the fifteenth of Richard the Second, which is the first statute that relates to Heresy. I have, in the note below, mentioned the first record in Rymer concerning the punishment of this crime, and the expressions used in the writ are too figurative and uncertain to argue from; and besides this, it is a writ directed to the seneschal of Gascony, and not to any sheriff, or civil officer in England. I do not find any further mention of heresy in Rymer, till the year 1370, and fortieth of Edward the Third, in which a writ issues to the bishop of London to *permit him to imprison* a person convicted of heresy, *till he should abjure*, and which does not even allude to burning, or any other capital punishment [z]. As for the statute of the fifteenth of Richard the Second, I have read it with great attention, and cannot possibly draw the same inference from it which the writer in the State Trials doth. He supposes that, in order to punish a here-

[y] Bishop Burnet informs us, that, notwithstanding this injunction to the sheriff to proceed immediately to the execution of the heretick, the king was advised by his learned counsel to issue the writ *De Haretico comburendo*. We find, in Rymer, a writ in the year 1214, and sixteenth of King John, *De Hareticis in Vasconia extirpandis*; strong expressions are used in this writ, as *penitus extirpare, et nequitiam detestabilem funditus confundere*; but it may be doubtful, whether this empowered the officer (*who is the seneschal of Gascony*) to inflict a capital punishment; nor can it be inferred (but by presumption), that such a writ ever issued from this king in England.

[z] There is a Scotch statute against heresy in the reign of James the First of Scotland, A. D. 1424, which directs that the bishop shall inquire into the offence, and be assisted by the secular arm.

tick under that statute, it was necessary to summon a convocation, which being often highly inconvenient, the present statute empowered the ordinary to try this offence. Now it is clear, by the writ above-cited of the year 1370, that the bishop alone could convict, but wanted the assistance of the king, or secular judge, to punish; and as for 5 Rich. II. ch. v. it recites, "that the terrible consequences of heresy had been considered by the archbishop of Canterbury and the convocation," but by no means confines the conviction to a convocation assembled, but, on the contrary, leaves it as before [a].

But the strongest argument against this opinion arises from the present law, which directs the criminal to be *publicly burnt*, and which, if it had been a known punishment by the common law, would have been so recited; and then indeed the whole law would have been in a great measure nugatory. The clergy, armed with this new power, did not long suffer the statute to continue a dead letter, for *Thorpe* was tried within five years of its passing, and the chaplains and clergy, who attended the archbishop, conceived that they had now not only power to burn, but to drown a heretic, and absolutely advised this latter method of punishment [b].

In confirmation of what I have here advanced, the writ which issued for the burning of *William Sawtree*, who was the first that suffered for heresy, makes no mention of its being agreeable to the ancient law [c]; whereas, in the time of James the First, this is added to the writ, and this possibly may have contributed to the opinion that such a punishment had been so long known in this country.

[a] This statute hath not been translated.

[b] State Trials, vol. I. p. 36.

[c] There is a writ in Rymer of the year 1410, and the eleventh of Henry the Fourth, which recites the punishment of burning a heretic to be agreeable to the ancient canon law: but this could not become the law of England till the present statute had adopted it.

How happy is the situation of an Englishman at present, that he can consider this terrible process as a matter of speculation, and calmly amuse himself with it as a common point of learning, or antiquity! The thunder-cloud is now removed to a safe distance, and becomes a matter of disquisition and curiosity, mixed with a pleasing terror.

STATUTES

STATUTES MADE AT WESTMINSTER,

4 Hen. IV. A. D. 1402.

THESE statutes which amount to the number of thirty-five chapters, relate to very miscellaneous matter. The 2d chapter, after reciting *les entiers coers et les grandes naturesses*, which the clergy of England had borne to the king, confirms all their rights and privileges; but at the same time directs, that the words *insidiatores viarum et depopulatores agrorum* (inserted in the petition of the clergy preferred to the king in this parliament) should not henceforward be used in any indictment, and particularly, that if any clerk is so indicted, he shall be immediately entitled to the benefit of clergy. This part of the statute would be absolutely unintelligible, was it not for the explanation which Sir Edward Coke [d] hath given us: *insidiatores viarum* were hereticks, who past up their notions and doctrines in the highways; and *depopulatores agrorum* were those who suffered the parsonage glebe to continue unimproved, and the parsonage houses to go to ruin and decay, this being supposed to tend to the depopulation of the country.

I should, from this explanation of the words by Sir Edward Coke, suppose that the new reformers, being persecuted by the regular clergy, had not rested merely on the defensive, but had prosecuted, in their turns, their persecutors by indictments at common law. The clergy attacked the reformers as *insidiatores viarum*, and the reformers carried on counter-indictments against the clergy as *depopulatores agrorum*, who did not repair dilapidations in their parsonage houses. This, at least, is the only light that I can pretend to throw upon this very obscure law.

The 11th chapter recites the great decrease of fish in the Thames (and other rivers) by feeding hogs with the fry caught at the wears, which seems to be a very singular re-

[d] Inst. 2. p. 41.

cital. There is, however, an Irish statute of Charles the First, which does not permit any hogs to be kept near the sea coast, *because they are said to destroy the spawn*; which is much more probable than that they should be capable of getting at the fish themselves. Be this as it may, the fry of the Thames is destroyed at present to make artificial pearls with the scales; and perhaps it is better that the fish should decrease than that we should lose so valuable a manufacture. It is indeed very doubtful whether any regulation for preserving fish, or any of the game laws, tend in reality to the increase of either fish or fowl; and it is remarkable, that in Cornwall, where the game laws are not put in execution, they have more partridges than perhaps any other county of England. The latest statute, however, with relation to the game, should be most strictly observed, as it preserves the farmer's grain from trespasses till the harvest is over.

This collection of statutes closes with some very severe laws against the Welsh [e], which were occasioned first by Richard the Second's being well received in Wales on his last return from Ireland [f], and now by the rebellion of Owen Glendower.

From the noble and most truly poetical ode, which was occasioned by the massacre of the Bards under Edward the First, it hath been generally conceived [g], that these laws of rigour were preceded by others still more rigorous during that king's reign. I have already had occasion to make some remarks on the statute of Roteland (or more properly *Ruyd-*

[e] The English at this time held the Welsh in great contempt: the bishop of St. Asaph had in this parliament advised the lords not to irritate them too much; who made answer, *Se de illis scurris nudipedibus non curare*. *Lel. Collect.* vol. ii. p. 31.

[f] See a collection of *ancient pieces touching Ireland*, printed at Dublin in 1757; and amongst these, *the story of Richard the Second being last in Ireland*, written by a French gentleman, who accompanied him in that voyage, and translated by Sir Geo. Carew.

[g] Humphrey Llwyd (who is generally very accurate in what relates to the history of Wales, or its antiquities) in his *Commentariolum*, falls into this common mistake. Speaking of the conquest of Wales by Edward the First, he says, "constitutis legibus, ne Cambri libertatibus et immunitatibus (quas Anglis ipse, et sui posterius concessere) gauderent," p. 75. He likewise supposes that Henry the Fourth, after the rebellion of Owen Glendower, made a statute, that no one either in the courts of justice, or their schools, should use the Welsh language p. 76. No traces of any such law are to be found in the Statute-book.

land) in the eleventh year of Edward the First, which was immediately after the conquest of Wales, and by which nothing more seems intended, than to make a thorough union both of laws and of people. I do not mean by this to assert, that no severity was used by the conqueror of Wales; Le-wellin, their last prince, complains of the English oppression in the most feeling manner: "Nam nos adeo spoliati eramus, immo in servitutem redacti per justiciarios, et ballivos regis, amplius quam si Saraceni essemus, vel Judæi. Denunciavimus domino regi, sed semper mittebantur justicarii et ballivi ferociiores, et crudeliores, et quando illi saturati erant per injustas exactiones, alii de novo mittebantur ad populum excoriandum, in tantum quod *Wallensis malebat mori, quam vivere* [b]." Besides this proof of oppression, a manuscript history, written by Sir John Wynne of Gwydir [i], authorises the supposed tradition of a massacre of the Bards; nor could the writer of that most admirable ode have made his bard so warmly express, or his reader feel, the tyranny of Edward, if he had not probably raised an indignation and fire in his own breast by reading of other materials, which I have not happened to meet with. I would only say, that we have no proof of oppression to the Welsh in our statute [k] book till the present laws.

The 27th chapter directs, that there shall be no *westours*, *rymours*, *ministral*, *ou autre vagabonde*, *pur faire kymortha*, *ou coilage*, which, as it hath not been translated, I shall render *waster*, *rhymor*, *minstrel*, or other *vagabond*, to make assemblies or collections. As for the word *kymortha*, it is plainly a Welsh word, but improperly spelt, as there is no such letter as *k* in the Welsh language. The common glossaries take no notice of this word; I have therefore looked into Dr. Davis's dictionary, who gives as the nearest word to it *cymmodd*, which he renders *cohabitatio*; and, as I apprehend the word

[b] Appendix to Wynne's history of Wales.

[i] Evans's Specimens of Welsh poetry, 1764. There is an account of a voyage to Spain, by this Sir John Wynne, printed after one of Hearne's *Collectanea*; he was to attend on Charles the First whilst in Spain, and sailed from Plymouth to the Greynoe.

[k] There are some statutes of the second year of this king with regard to the Welsh, but they cannot be considered as laws of extraordinary rigour.

cymmodd is pronounced *cummoth*, it comes pretty near the word *kymorthas*; which being Welsh, it is not to be supposed that it should have been either pronounced or spelt with any accuracy, as there were at this time no regular representatives for Wales in the English parliament, though Sir Edward Coke [1] makes mention of twenty-four from North-Wales, and the same number from South-Wales, which were summoned to a parliament held at York in the fifteenth of Edward the Second [m].

It appears by the laws of *Hoel Ddha*, that there were good political reasons for abolishing the Welsh bards and harpers, as they were the Tyrtæus's upon every expedition against the English: "Quandocunque musicus aulicus iverit ad prædam cum domesticis, si illis præcinerit, habebit juvencum de præda optimum; & si acies sit instructa ad prælium præcinat illis cantieum vocatum *Unbenjaeth Prydain* (five Monarchia Britannica [n])."

And

[1] In his 4th Institute.

[m] Since the former edition, it hath been suggested to me by a learned and ingenious friend, versed in the Welsh language, that the word *kymortha* may have been inserted in the Statute-book instead of *cynncorfa*, which is the plural of *cynncorff*, and signifies *commotion*, or *tumult*; and this seems to agree well with the sense which the text requires. In the collection of these Ordinances by Rymer (vol. iii. part iv. p. 199), this word *cymortha* is spelt *comartha*; and in the same clause (which differs in many particulars from that in the Statute-book), the Welsh are afterwards permitted to make *comartha* *resonables*, which favours however the sense in which I have first explained this word. There are likewise some chapters of these Ordinances in Rymer, which are not to be found in the Statute-book. The *Nova Statuta* (printed by Pynsen) uses the word *comonvaes* instead of *kymorthas*.

[n] The notes to *Hoel Ddha*'s laws give us no light with regard to this old British song, nor have the modern Welsh harpers any tradition of a tune so entitled. The best and most ancient tune, which they have still retained, is called *Morfa Rbydland* or *Rbydland*, where the Welsh received a great defeat: the melody is plaintive and good. Chaucer, in the Prologue to the Miller's Tale, mentions a tune called *The King's Note*, which seems to have been well known at that time.

"And after that he songe the *Kynges Note*,
Full oft blessed was his merie throte."

Chaucer likewise, in the *Frankleyn's Tale*, makes mention of the Welsh Bards singing to their harps.

"These old gentill Britons in her daies,
Of diverse adventures maden laies;
Rimed first in her mother tongue,
Which laies with her instrument thei songe."

And again. "Quando cantica requiruntur, musicus cui jus
" cathedræ competit, Dei laudes primo decantabit, & deinde
" regis in cujus palatio fuerit."

The army being preceded at its onset by a bard, or singer of a particular song, is not peculiar to the Welsh; Voltaire gives us the following account of a battle by the Normans:

"Les anciennes chroniques nous apprennent, qu'en premier rang de l'armée Normande, un ecuyer nommé Taillefer, monte sur un cheval arme, chanta la chanson de Roland, qui fut si long tems dans les bouches des François, sans qu'il en soit resté le moindre fragment. Le Taillefer [o], après avoir entonné la chanson que les soldats repetoient, se jeta le premier parmi les Anglois, et fut tue [p]." We likewise find, that amongst the northern nations, the Scaldi or Bards were to advance before the troops: perhaps the song of Britons, *Strike Home*, might have its effect in animating a modern army, if the noise of artillery and fire-arms would not soon drown all inferior shouts.

Bishop Nicholson, in the appendix to his Historical library, hath given us some curious particulars with regard to the Irish bards, whom he represents to have obtained great part of their lords lands, and who were likewise, upon all occasions, very tumultuous and disorderly. Baron Finglass, who wrote in the time of Henry the Eighth a *Breviate of Ireland* [q], proposes not only severe regulations against rhymers and

The instruments used by the English, in Chaucer's time, were the *Ribible*, *Geterne*, and *Sautrie* (see the Miller's Tale); and it should seem that such a player attended at most of the taverns (or *brew-houses* as they are called by Chaucer), for the entertainment of the guests, as the harpers generally attend in Wales at present. The English lover likewise serenaded his mistress. The kings of England had formerly both harpers and bagpipers in their band of Musick, and with a salary of 38 l. per. ann. in the first year of Queen Mary. The two harpers (musicians to this queen) were not Welshmen (as far as can be collected from their names), nor was the bagpiper a Scotchman.

[o] This same Taillefer we have an account of likewise in the *Romaunt of the Rose*:

"Taillefer qui moult bien chantoit,
" Sus un cheval qui tost alloit,
" Devant eus alloit chantant,
" De l'Allemagne; et de Rollant,
" D'Oliver et des vassaux,
" Qui morurent en Rainschevaux."

[p] Voltaire's Add. Hist. Univers. p. 69.

[q] Amongst the pieces touching Ireland, published at Dublin, 1757.

minstrels,

minstrels, but also against the *shamhuhs*, who, it seems, were the Irish genealogists. Hollinshed, in his Chronicle, likewise informs us, that the Irish bard (if he was not well paid for his panegyric) turned libeller immediately; and if his audience were not attentive to his musick and poetry, that he commanded silence in the most imperious manner.

Notwithstanding these statutes of Henry the Fourth [r], the bards and musicians continued in Wales, and had regular degrees and rank in their science or profession, as we find by a very curious commission of Queen Elizabeth, which is prefixed to a collection of Welsh poems, published by the Rev. Mr. Evan Evans in 1764 [s].—This commission directs those, who are not *real bards* and musicians, to be treated as vagabonds; and by an ordinance of Cromwell, in 1656, any minstrel, or *fidler* [t], who shall be *making musick* in any inn, or tavern, or shall ask any one to hear his musick, is to be punished as a sturdy beggar.

The other chapters, which relate to the principality, enact, that no Welshman shall have any office in Wales, except a bishoprick; that they shall not have any castle, fortress, or house of defence [u]; and by the last chapter, the marrying even a Welshwoman incapacitates an Englishman from holding any office.

These must be allowed to be laws of rigour; other causes however, besides the rebellion of Owen Glendower [w], might possibly have contributed to those odious and disagree-

[r] By the laws of Macbeth, a minstrel is to draw the plough instead of the ox.

[s] Printed for Doddsley, 4to.

[t] *Fidler* does not signify what we now understand by the word, *player on the violin*; thus in *Fletcher's Knight of the Burning Pestle*, "they say it is death for these *filders* to tune their *rebeck*." The violin was not known in England till the time of Charles the Second: it seems to have been borrowed from the old Welsh instrument, called a *crwth* *; which is not however tuned in the same manner with a violin, nor are there above two or three persons now in Wales who can play upon it.

[u] This part of the law was probably carried into execution, and accounts for there being no considerable ancient, and at the same time fortified houses, belonging at present to the gentry of Wales.

[w] Glendower's real name was Vaughan, and he was originally a barrister of the Middle Temple.

* "Romanusque lyra plaudat tibi, barbarus harpa,

"Græcus Achilliaca, Cæta Britannia canat."

VENANTIUS.

able distinctions between the king's English and Welsh subjects.

Notwithstanding the conquest of Wales by Edward the First, and his having introduced, in some measure, the English laws and customs by the statute of Rhyddland; yet perpetual incursions and depredations were made by the Welsh upon the adjacent English counties, and which did not perhaps arise so much from hatred to the conquerors, as from its being customary, in all mountainous districts (till they are more thoroughly civilized), to invade their richer neighbours,

(suadet enim vesana fames)

and who inhabit a more fertile country. When the cattle are driven into the mountains, the attempt to recover them is attended with danger, and if the pilferer is overtaken, it requires no small number of pursuers to bring them back with safety to the owner. We find this to prevail more or less in all parts: the mountain Arabs pilfer [x] from the inhabitants of the more level countries; the Tartars made the same depredations upon the Chinese till the famous wall was built; and the Highlanders of Scotland [y] (if not yet thoroughly civilized by the wise laws, which both England and Scotland owe to the late Earl of Hardwicke) still continue the same incursions upon the Lowlanders [z].

[x] "Les Arabes s'en vantent des leurs voleries, comme d'une marque d'esprit." Dapper, p. 295.

[y] There is amongst the *Black AEs* a law that does great honour to these Highlanders, which makes it a capital offence to rob their prisoner; and Lesly, the Scotch historian, says, that "justice (amongst themselves) was so well established, that the *very rusties* might have guarded the cattle." In the boundaries between two countries, however, violence from one quarter naturally produces a return of the same disorder and rapine; and therefore we find, during the reign of Henry the Fifth, three different statutes for introducing better police into the county of Hereford, which being bounded not only to the west by Radnorshire and Brecknockshire, but to the south by Monmouthshire (then part of Wales), seems to have wanted as many regulations, as the Welsh counties complained of in the preambles to those statutes.

[z] Blaeu, in his account of Ireland, says, that the inhabitants of the uncivilized parts, "latrocinaturi preces ad Deum fundunt." Mountaineers likewise have not so early a regular system of laws. Thus the Cyclops, in the mountains of Sicily, are described by Homer:

Τοῖσιν δ' ἐτ' ἀγοραὶ βασιφόραι, ἐδὲ δεμισίς
Ἄλλ' οἷ' ὕψηλ' ὄρεων ναιέσι κάρηνα
Ἐν σπείωι γλαυροῖσι, δεμισύει δὲ ἔχασθ'
Παίδων ἡδ' ἀλόχων' ἐδ' ἀλλήλων ἀλίσσονται.

Odyss.

I would

I would not by this be understood to insinuate, that the mountaineer is born with a worse disposition than the inhabitant of the more level country; such depredations are at present called *pirating*, as we term the captures by the Algerines *acts of piracy*. We must recollect, however, that the Welsh, considering themselves as oppressed, and in a state of war, had never made any treatise [a] of peace with their neighbours, by which they stipulated not to make short expeditions into an enemy's country; and for the same reason that the Algerines have never made any such treaty with the Italian states.

The Mediterranean sea hath in most ages been infested with this kind of free-booter; for Nestor asks Telemachus in the *Odyssey* (when he means to receive him with the greatest civility and hospitality) *whether he is a pirate*; and Plato observes, *ὅτι γὰρ Ὀμηρὸς [b] τὸν Ὀδυσσεὺς πρὸς μητρὸς παππὸν αὐτόλοχον ἀγαπᾷ τε καὶ φησὶν αὐτὸν ὑπὲρ πάντας ἀνθρώπους κέλιδος κλεπτοσύνην*. Even the Generals of the civilized Athenians were by their laws obliged to take an oath to make incursions twice every year upon the Megareans, *δὲς ἀνὰ πᾶν ἔτος εἰς τὴν Μεγαρικὴν ἐμβάλλειν* [c]. Plutarch indeed, in his *Life of Pericles*, supposes, that

[a] The Algerines observe the treaties which they enter into, perhaps, as well as some European powers.

[b] If the illustration of a law, by a citation from a poet, is objected to, my best answer will be (not to dwell on the authorities of Grotius, Puffendorf, and other great writers) that it should seem from the oration of *Æschines* against *Timarchus*, that the poems of Homer were on the tables of the courts of justice, together with the Athenian laws; and that the clerk is frequently applied to by the orator to read both the one and the other. It is likewise somewhere mentioned (though I do not recollect by what author *) that a dispute between the Athenians, and the inhabitants of Salamis, was determined merely upon these lines from Homer's catalogue of the Grecian fleet:

Αἴας δ' ἐν Σαλαμῖνι ἄγει δυοκαίδεκα νῆας,
Στῆσε δ' ἄγων, ἵν' Ἀθηναίων ἱσαντο φάλαγγες.

from which the inferiority of the inhabitants of Salamis at that time was inferred; and in the dispute with regard to the boundaries of France and Spain, which was settled between the two crowns in the last century, *Petrarch* the poet is cited as authority. See Baluzius's Preface to the *Marca Hispanica*, Paris, 1688, Folio. It should seem that the authority of the Greek tragedians was also sometimes appealed to in the Athenian courts of justice, as there is a law (in *Petit's* collection) *τὰς τραγῳδίας τῶν ποιητῶν Αἰσχύλου, Σοφοκλέους, Εὐριπίδου, τὸν γραμματεῖα τῆς πόλεως παραγινώσκειν*. Lib. i. tit. i.

[c] *Petit. Legg. Att. p. 21.*

* Since the former edition, I find this circumstance is mentioned by *Diogenes Laertius*, in his *Life of Solon*.

this law was occasioned by the *Megareans* having killed an Athenian herald. According to his account however it was inserted in the oath, which the Athenian generals were obliged to take when they first entered on their office.

Τὸς δὲ *σεβήτης* (ὅταν ἀμύνωσι τὸν παλῖχον ὄρκον) ἐπομύειν, ὅτι καὶ δις ἀνὰ πᾶν ἔτος εἰς τὴν Μεγαρικὴν ἐμβάλλουσιν [d].

[d] Vol. i. p. 168. ed. Francofurti, 1620.

STATUTES

STATUTES MADE AT WESTMINSTER,

5 Hen. IV. A. D. 1403.

TH E 3d chapter of this statute directs, that watch should be made on the sea-coast, at the places, and in the manner it used to be made; which I should not have taken notice of, was it not to introduce a record, which is cited by Prynne in his animadversions on Sir Edward Coke's 4th Inst, and which shews in what places this watch used to be made, and upon what eminencies beacons were erected, to give notice of the invading enemy. Possibly such beacons might be of use when an invasion is apprehended; and this book of Prynne's will not probably make part of a captain general, or lord admiral's library [e].

[e] It is, perhaps, as improbable indeed, that these Observations will ever make part of such a library.

“ Ordinance pur sauacion des pais de Kent et Desez, et nomement
 “ pur les villes esteantz sur la Ryvere de Thamysse, pur periles que
 “ fodeinement leur purroit avenir pur noz enemys come dieux defende,
 “ et auxi pur la sauacion de la Navye esteant es portz du dit
 “ River.

“ Primes, soit ordeine al Isle de Shepeye un Beken, et a Shoubery en Essex
 “ un autre Beken. Item, a Hoo en Kent un Beken, et a Fobbing en Essex un
 “ autre Beken. Item, a Cleve en Kent un Beken, et a Tilbery en Essex un autre
 “ Beken. Item, a Gravesend en Kent un Beken, et a Farnedon en Essex un
 “ autre Beken.

“ Item, que par especial maundement de per nostre tresredoute Seigneur le Roy
 “ soient chargez as viscountz, constables, et autres ministres, et avantdites parties
 “ de Kent et Desez, que tous les dites Bekens soient hastivement et convenable-
 “ ment as lieux avantnommez appareillez et parfaits, pur sauacion des pays avan-
 “ diens, et pur la dite navye.

“ Item, que tantost que les dites Bekens soient faites, qils soient bien et conven-
 “ ablement veillez, sibien de jour come de nuyt sanz faut.

“ Item, que les veillours que pur le temps ferront as dites Bekenes, et nomement
 “ as Bekenes de Shepeye, et Shoubery, soient de temps en temps garniz et
 “ chargez, que austost qils purront espier aucunes vessels d'enemys venantz ove
 “ seil ou ores devers la dite ryvere, sifost les ditz leur Bekenes de Shepeye et
 “ Shoubery soient mys a fire, enfesantz ovesque ce toute la noise de corn et de cri
 “ qils purrent faire, pur garnir la pais environ pur venir ove leur force au dite
 “ ryvere, chescun en socours dauters pur contester leur enemys.

“ Item, que les pais avandites soient garniz et amonestez sur grevouise peine
 “ que tantost qils veient les dites Bekenes, ou les unes de eür mys a fum, ou qils
 “ oient la noise de corn ou de cri, qils vieignent prestment de leur meillour arrale
 “ d'armes tanque au dit ryvere, pur sauver les villes esteantz sur ycel, come la
 “ navye esteant es portz, sanz damage de nos enemys.”

The

The 5th chapter makes it felony to cut out the tongue, or pull out the eyes, of the King's liege people, which it recites to have been very frequently practised; and which shews what animosity had been already occasioned by the disputes between the houses of York and Lancaster. The Coventry act (as it is called) of Charles the Second, passed, indeed, at a time when parties ran high; but that was a single instance of such a maim; nor did the preceding civil wars produce any such proof of horrid barbarity. Amongst those who had been maimed at this time, Richard Cheddar (who was a servant or officer to Sir Thomas Brooke, knight of the shire for the county of Somerset) had been beat and *blemished* [f]; and the 6th chapter directs, that the person guilty of the offence shall surrender himself (upon a proclamation issuing) to the judges of the King's Bench; and that, if any such assault is made upon the servant of any other member of parliament, the same remedy shall be given to the party injured.

There are two or three particulars in this short chapter which deserve notice; the first is, that Richard Cheddar (the person maimed) is styled *Escuyer*, and yet was a servant to Sir Thomas Brooke; the next is, that the assailant is styled John Salage (*otherwise Savage*), which is the first precedent that I find of the *alias* being used; and it is very remarkable that the statute of *Additions* passed the following year. Lastly, this is the first instance of privilege of parliament being mentioned in the statute book; and it should seem that it was meant only to extend to the members or their servants, *whilst the parliament continued to sit*, as in the preamble it is recited by way of aggravating the offence, *que le dit horrible fait fut faist deins le temps du dit parliament* [g].

The

[f] In the original *emblemiz*.
 [g] Parliaments then sat but for a few days; those who have a curiosity to see how many, may consult Prynne's *Brevia Parliamentaria Rediviva*: the parliament of the 7th of this king having sat nearly a year, it was matter of complaint on account of the payment of the wages. It appears by Lord Clarendon's *Posthumous History*, that the house of lords, in the time of Charles the Second, were so desirous to preserve their privileges, that they insisted upon a particular provision in their favour, in a statute made to prevent the stealing of wood. In the Debates of the house of commons, during the session of 1620 (published from a manuscript in the library of Queen's College, Oxford), Sir Edward Coke asserts it to be law,

The 5th and last chapter contains a general pardon, and which I should not have observed upon, was it not to say, that the authors of the parliamentary history have, without cause, objected, that it does not make mention of the most essential and necessary word, *that of treason* [b].

It seems likewise to be a mistake in most historians, who take notice that the parliament, which assembled the following year, was the famous *Parliamentum Indoctum* [i]; from which the Lawyers were excluded, as there is no summons to be found in *Dugdale* for the following year, but on the contrary for the present; and this observation seems to be confirmed by the very unusual alternative given either to the judges or jury, to assess damages by the 6th chapter of this statute, which I have before observed upon.

It is very extraordinary that *Fortescue*, who wrote his treatise *De Laudibus Legum Angliæ*, so soon after this statute, should not have taken notice of this exclusion [k]. I should imagine that it arose not from contempt of the common law itself, but the professors of it, who at this time being *auditors* to, and dependants upon men of property, received an annual stipend *pro consilio impenso & impendendo*, and were treated as *retainers*. It is probable that the profession of the law, not enobling their descendants in other parts of Europe, arises from the same cause: such descendants are

law, that, in cases of *treason* and *felony*, there is no privilege. If he had conceived that privilege might be claimed in misdemeanours, he would certainly have laid this doctrine down with precision. Vol. i. p. 109.

[b] There is, indeed, another particular, which deserves notice, that this Richard Chedder, upon surrendering himself, is to make satisfaction either by the award of the judges of the King's Bench, or by a jury; and I do not recollect an instance of such an alternative.

[i] "*Rex brevia direxit vicecomitibus, ne quosdam pro comitatibus eligerent qui in jure regni docti fuissent.*" Tho. de Walsingham, p. 371. Stowe says it was called the *Laymans Parliament*.

[k] Whitelock supposes that the lawyers were excluded by the crown, who apprehended opposition from them; this however is contradicted by what he mentions previously, p. 357. He likewise adds, that those who will have a *nolimus* of learned senators, must have a *volumus* of uncouth laws. Comm. on Parl. Writ, vol. ii. p. 361. 366. London, 1766. Pride the Drayman used to say, that it would never be well, till the lawyers gowns (like the Scottish colours) were hung up in Westminster-Hall. Fab. Phillips on Capias's, and process of Outlawry, p. 316.

not

not at this day so considered in Germany, nor were they anciently in France, as it required the intervention of the parliament of Paris to enoble the son of the famous advocate *Le Maître*. *Voltaire* speaks thus of it: *C'est une reste de l'ancienne barbarie, d'attacher de l'avilissement, a la plus belle fonction de l'humanité, celle de rendre la justice.*

STATUTES

STATUTES MADE AT GLOUCESTER,

9 Hen. IV. A. D. 1407.

THIS is the only parliament of the present reign which was held at any other place but Westminster; and the occasion of holding it at Gloucester arose from a new rebellion, which the arch-rebel, Owen Glendower, had raised in South-Wales [1].

The 1st chapter of this law confirms all liberties and franchises granted by the king, either to the clergy or laity, except some franchises lately granted to the University of Oxford; and this exception is anxiously repeated by the 1st chapter of the 13th of this king: I cannot find what might have occasioned this [m], and leave it to those who are better versed in the antiquities of this great and first University of Europe [n]. It is the more remarkable, as Henry the Fifth was educated at Queen's College in Oxford; and the apartments, in which he lived, were commonly shewn to the curious stranger, till the old gateway (from Edmund's hall) was pulled down within these few years, to make room for the new wing of building, which hath now compleated the college. The University might, therefore, have expected support from their illustrious academick, instead of marks of the royal and parliamentary displeasure; were not the irregular sallies of his juvenile years, perhaps, attributed to a want of attention to his education, whilst the

[1] Carte informs us, that he died at his daughter *Monnington's* house, in Herefordshire, eight years after this, viz. anno 1415. There is a family of the name of *Monnington* established at *Sarnesfield*, in Herefordshire, at this day, and probably the same family.

[m] By 9 Hen. V. ch. ix. certain scholars are banished from the University of Oxford, on account of riots and disturbances.

[n] *Wycliffe's* doctrines were well received in that University, which might make them obnoxious to *Thomas Arundel*, Archbishop of *Canterbury*.

prince resided there. The University of Oxford is not much indebted to the kings of England [o] for their munificence and benefactions, if we except perhaps *Alfred*; nor do I recollect any instance of parliamentary favour, if the not allowing the last Mortmain act to extend to the two Universities may not be considered as such.

After all, perhaps, royal favours and benefactions may often rather prove detrimental than beneficial, if not in the infancy of such establishments, and then most wisely and discreetly dispensed, which is not often the case. If an argument may be drawn from the encouragement of the polite and elegant arts to the promotion of science; it is very remarkable, that the French school hath not produced any very capital painters since the expensive establishment by Lewis the Fourteenth of the academies of Rome and Paris. A hot bed in a garden, may produce more luxuriant plants than the natural soil; but the too sumptuous establishment does not seem to contribute to the production of the more exalted and sublime genius, who

— “nascitur, et non fit,”

I do not meet with any more laws of this king which it is necessary to observe upon [p]; if it be not the 7th chapter of the 13th year of his reign, which directs, that rioters may be arrested by the justices of the peace, and that, together with the sheriff (or under-sheriff), they must transmit a certificate of their offence within a month to the king and council, and that these certificates shall be of *as great force* as a presentment by a jury. This seems to be the first instance of giving very extraordinary powers to justices of the peace, for the punishment of offences, without

[o] The king of Denmark, in the year 1622, made a regulation for the encouragement of the University at Copenhagen, “*Nequis exteras adiret Academias, nisi prima Philosophiæ laurea Hafniæ foret redimitus.*” *Messenii Chronologia Scandiana*, t. v. p. 9.

[p] In the 4th chapter of this statute, which relates to felonies in Wales, *lettres de Marche* is most improperly translated *letters of Marque*; it means a letter of *marche*, already expounded to mean the confines of the two countries.

the intervention of a jury; and which was carried so much further by *Empson* and *Dudley* in the reign of Henry the Seventh.

I am now to consider this king as a legislator, and I do not find any unconstitutional law of his whole reign, except the statute which I have above observed upon with regard to heresy. His title to the crown was far from being a clear one: Sir Robert Cotton says of him [9], "Now succeedeth a man that first studied a popular party "to support his title;" and it hath been often said, that the *worse title*, the *better king*, of which Richard the Third is, by some, considered to be an additional proof. Mr. Cay (in his preface to the Statutes) hath strongly combated this notion: an attention, however, to the points desired and wished by the people, seems to be a necessary consequence in him who wants their support. The misfortune is, that, though constitutional points may be willingly ceded by a king, whose title is not established, the civil war (that most dreadful of national calamities) occasioned by the throne being disputed, makes us forget the benefits which arose from the feuds and contests occasioned by the usurpation.

Grafton [r] indeed asserts, that Henry raised supplies without the intervention of the commons, and that he likewise interfered in the election of members of parliament: I do not find the least traces of this in the laws themselves; and, on the contrary, by the 15th chapter of the seventh of Henry the Fourth, provision is made for the more free election of the knights of the shire, who were before this, in effect, chosen by the sheriff [s], who was the king's officer.

To fix the merit of this king as a legislator, he had the spirit to insist upon and enforce the wise statutes of *Provisors* made by Edward the Third, and that by expressions, which one could hardly expect to find in the statutes of

[9] Posthuma, p. 18.

[r] Grafton, p. 22.

[s] See the preamble to 5 Hen. IV. ch. vii.

a country, which still continued to be of the Roman-catholick persuasion: " Sur la grevouſe complainte faite a
 " noſtre Seigneur le Roi, par ſa commune (en ſon parle-
 " ment tenuſ a la ſixieme jour d'Octobre, l'an de ſon regne
 " ſiſme) del horrible malveiſe et damnable cuſtume que eſt
 " introduce de novel en la cour de Rome."

Theſe expreſſions are, perhaps, as ſtrong as can be found in any of the ſtatutes of the reign of Henry the Eighth.

STATUTES

STATUTES MADE AT WESTMINSTER.

1 Hen. V. A. D. 1413.

THE first chapter of this statute regulates, both who shall be chosen representatives in parliament, and who shall be the electors. By the words of the law it seems to be a necessary requisite, that both the one and the other should be resident in the county at the time when the writ of summons issues (whatever may have been the parliamentary exposition) and that the residence intended was a personal residence: "*S'ils ne soient reseant dans les dites countees, ou ils seront isint elus le jour de la date du brief de summons, que les elifours des chevaliers des countees soient aussi reseants en mesme le maniere.*" The same direction is repeated with regard to burgesses [1]; Sir Edward Coke, accordingly, in the short notes of his speeches inserted in the Journals of the House of Commons, expressly says, that the meaning of this statute is, that the person chosen should be well known to the electors [2].

The 3d chapter is the first law which relates to the offence of forgery, which it punishes by satisfaction to the party injured, and likewise a fine to the king. The expressions used in this branch of the statute are remarkable: "*Diverses malveis persones, aucunes de leur tete demieses, et aucunes par faux conspiracie et covyne, subtilement imaginent, et forgent de novel diverses faux faits et muniments, et les fount prononcer, publier, et lire, pour enveogler et chaunger les cœurs des bons gents du pays, et pour troubler les possessions et title des dites lieges.*" From which it should seem, that forgeries, at this time, were not so much intended to gain

[1] By an Irish statute of Henry the Seventh, no one is to have an office in any town where he is not resident. Cox's History of Ireland, p. 188.

[2] Whitelock likewise gives it as his opinion, that residency is necessary in the electors by the words of this statute, though he admits that it hath of later times being connived at. Comm. Parl. Writ, vol. i. p. 496. He likewise mentions a doubt whether the candidate can be chosen, but by those who were present at the proclamation of the writ. Vol. ii. p. 25.

possession, as to give disquiet and anxiety to their neighbours. The dissensions and civil wars occasioned many extraordinary instances of malice; another proof of which appears by a statute of the seventh year of this king, which recites, that there had been many indictments, laying the fact to be committed in places which were not to be found in the county, and merely to harass and give anxiety to those against whom such malicious indictments were preferred.

The 5th chapter is the known *Statute of Additions*, from which it should seem, that the people of this country had greatly increased, so as to make distinctions necessary. Fuller, in his *English Worthies*, asserts, that these distinctions were not used, but in law process, till the latter end of the reign of Henry the Sixth, and that *John Golope* was the first person who assumed the title of Esquire [w]. He likewise supposes, that the rebellion of Jack Straw, and Wat Tyler, made the English gentry desirous of distinguishing themselves from such contemptible levellers and rabble.

The 6th chapter enacts, that no Welshman shall take revenge against those Englishmen, who pursued their friends and relations in the late rebellion; and, particularly, that they shall not imprison the English, till they have proved (by what the statute styles an *Affach*) that they were not guilty of killing, or wounding, the relations and friends of a Welshman. The law is, in itself, of a very singular nature; the term *affach* is rendered in Richards's Dictionary (where it is spelt *asach*) by the word oath; I cannot, however, find it either in Dr. Davis's Dictionary, or the Glossary to the laws of Hoel Ddha. The statute itself afterwards explains the word, agreeable to the signification in Richards, to be, *s'ex-cuser de la mort par le serment de ccc hommes*; and it could hardly be expected, that an Englishman, in a Welsh prison, could ever procure such a number of *Cumpurgators*. The number, indeed, of such Compurgators, in many of the ancient laws [x], both in *Lindembrogue* and *Baluzius*, must make

[w] We find, however, that by a statute of the preceding reign, one *Cbeddar* is styled *Esquier*.

[x] "Vulgus in Suecia valde procinctum est ad compurgationis juramentum." *Loccenii Leg. Provinc.*

the defence impossible, even to a native of the country, if we do not suppose that perhaps thirty only swore to the innocence of the person accused, and the other two hundred and seventy to support the testimony and credit of these thirty.

The 6th chapter directs, that the revenues of Calais shall be employed in the maintenance of it. I have already had occasion to observe upon the increasing expence of the fortifications of this place; and by a manuscript which I have before mentioned (to be an account of the salaries of different officers in the first year of Queen Mary) the salaries of the governor and officers of the garrison amounted to four thousand and thirty-six pounds six shillings and four-pence; at the same time that the expences of the queen's household, was only fifteen thousand seven hundred and sixty-seven pounds five shillings.

T 3

STATUTES

STATUTES MADE AT LEICESTER,

2 Hen. V. A. D. 1414.

THE 7th chapter of this law against the hereticks, called Lollards, was but too sufficiently promulged in the same year, by the execution of nine and thirty hereticks [y], and amongst the rest the famous Sir John Oldcastle. The tenets of this sect were (it is believed) nearly the same with those of *Wycliff*; and when one enthusiast is followed by multitudes [z], some of the new converts generally set up for themselves, with, perhaps, some very trifling and immaterial deviation from the first fanatic, but which, however, immortalizes them in the disputes of polemical divinity [a]. Sir Henry Spelman gives us the following account of the origin of this word. *Lollardorum nomen exortum est in Anglia, sub* “*excessu Edwardi tertii. Dictos opinatur commonachus Sti.*” “*Augustini Cantuar. a lolio, quod, sicut lolium, (inquit, se-*” “*getes Domini inficerent. In sententiam ejus abiit Lynde-*” “*wodus, sed perperam uterque. Trithemius enim in Chro-*” “*nico ostendit, eos a Gualthero Lollard Germano quodam,*” “*qui floruit circa annum Domini 1315, originem duxisse*” “*[b].*”

[y] Polychronicon.

[z] I would not by this be understood to reflect upon the memory of *Wycliff*, which deserves to be venerated by every good protestant.

[a] Some of these sects went so far as to dispute the principal tenets of Christianity, as appears by the old verses,

“*Wit hath wonder, and reason cannot scan,*“*How a moder is mayd, and God is man;*”which are said to have been made by one *Peacock* in the following reign. The answer given by the orthodox was,“*Leve reason, beleve the wonder,*“*Belef hath master, and reason is under.*”[b] I have been informed, that *Mosheim*, in his Ecclesiastical History, denies that any such etymology of the word *Lollard* is to be found in *Trithemius*; he, on the contrary, derives it from the German word *tullen*, or *lollen*, which signifies to sing in a low voice, and the common termination *bard*, with which many of the old German words are said to end. I have never seen this Ecclesiastical History of *Mosheim*, but can venture to insert this remark, from the learning and accuracy of the person from whom I have received it, since the former edition.

It

It is part of the directions of this statute that certain officers, and amongst the rest the sheriff, shall swear that they will execute the law against Lollards; and Sir *Edward Coke*, when he was made sheriff of Buckinghamshire, objected to that part of the oath, which obliged him to prosecute *Lollards*, saying; *he did not know what the term meant* [c].

Sir John Oldcastle, who was prosecuted on this statute, appealed to the king as supreme head of the church, which he declined; and Grafton [d], who mentions this circumstance, at the same time informs us, that the preceding year this sect had increased to such a degree, that an act of parliament was intended to suppress all religious houses, but that it was dropped on account of the French war. These two fundamental articles of reformation were not, therefore, altogether new ideas, in the reign of Henry the Eighth.

Those who may have curiosity to search for more particulars with regard to the first prosecutions on this statute, may consult Elmham's life of Henry the Fifth, published by Hearne, and likewise Baile's account of Sir John Oldcastle, as well as most of the Chroniclers of the time, who, being generally monks, are excessively lavish in their praises of it. Henry the Fifth, himself, might, in his younger days, have been inclined to libertinism; but one need only read his will in Rymer, made in the third year of his reign, to see that he was now become excessively devout, and that he might be inclined to support the clergy in this Statute of persecution.

I do not find any more statutes of this king which require any explanation: his reign was so short, and so much of it taken up, either in preparations for war, or actual campaigns, that much is not to be expected from him as a legislator. The laurels which he acquired are well known; but he hath left us, in a preamble to one of his statutes [e], most irrefragable proof, that they were not obtained but at the dearest price, *the depopulation of the country*. The king is permitted to

[c] Fuller's Worthies, p. 141.

[d] In his Chronicle, p. 35.

[e] 9 Henry V. chap. v.

appoint sheriffs for four years by this statute, because it is recited, "*that by wars and pestilence there are not a sufficient number remaining, in the different counties, to discharge this office from year to year.*" I have before taken notice of the statute against the *Lollards*; and the number of executions, which he seems to have at least permitted, if not promoted, should be remembered by every friend to civil and religious liberty, as long as the battle of *Agincourt*.

STATUTES

STATUTES MADE AT WESTMINSTER,

1 Hen. VI. A. D. 1422.

TH E first chapter of the first statute of this minor king empowers his council to appoint in what places money shall be coined; which I should not have observed upon, did it not afford an argument, that, though a minor king is said to be invested with the complete regal authority, yet the interposition of the privy council is hereby immediately made necessary to the carrying into execution, what is on all hands confessed to be, perhaps, the most undoubted of royal prerogatives.

The 3d chapter directs, that, on account of the murders, rapes, robberies, and other felonies, committed in different counties of England by Irishmen, resorting to the university of Oxford, all natives of that country shall be obliged to leave England within a month, under pain of forfeitures and imprisonment, except graduates in the university [f], beneficed clergymen, and lawyers; and that even these graduates in the university (though permitted to continue) should not be capable of being chosen principal or head of any house or hall. The severity of this law is not, indeed, equal to the rigour of those against the Welsh in the preceding reign; but the Irish had not (as far as I can find by their historians [g]) been guilty of any rebellion or insurrection in their own country, and surely some riots in the neighbourhood of Oxford might have been punished in the common course of proceeding against malefactors, without banishing a whole nation, which was now incorporated with England. The statute of the 1st

[f] En les escoles, in the original.

[g] They do not even take notice of this statute, or the first of Henry the Fifth, against the Irish.

of Henry the Fifth, which likewise directs the Irish to repair to their homes, gives a more humane reason for the injunction, viz. "*That their own country was depopulated by the great resort of the Irish to England.*"

The 5th chapter enacts, that a third part of the booty (taken during the wars) shall be allowed at the Exchequer to the late king's officers; and one part of the booty is recited to be the ransom of prisoners; the remaining two-thirds are to be paid to the crown. War is now carried on upon a so much more liberal and humane footing, that such a distribution of the booty, and arising from such articles, may rather surprise a reader of these times. I remember, however, to have seen in *Leland's Collectanea*, two or three different accounts of great houses and castles being built out of the price of a prisoner's ransom; and, if my memory does not fail me, Leland mentions, *Sudely Castle* [b], in Gloucestershire, having been most sumptuously completed out of the ransom of a French knight: there is likewise a record in Rymer, by which it appears, that Henry the Fourth paid ten thousand marks to Owen Glendower, for the ransom of Lord Grey of Ruthin [c]. An old French Chronicle, printed at Paris in 1508, and which gives the most complete account of what is called the fabulous part of the English history that I have happened to meet with, speaks thus of the great pressing of

[b] The windows of this castle are said by Leland, to have been glazed with beryl.

[c] Owen Glendower married the daughter of this Lord Grey of Ruthin for his first wife, and obliged the father to give his consent whilst he was his prisoner. St^e. Palaye, in his dissertations on the ancient Chivalry, gives an account of a French knight (whose name was Du Guesclin) being taken prisoner in the battle of Poitiers, and who fixed his own ransom at a very high price. Upon the prince of Wales's expressing doubts, whether he would be able to raise such a sum, Du Guesclin answered, that he first depended upon the kings of France and Castile, and, if they would not pay the ransom, he had at least a hundred friends who would sell their estates, and that every woman in France would spin for his deliverance: this prisoner, notwithstanding, is said to have been more than commonly deformed. Montluc (in his Commentaries) speaks thus likewise of the ransom which he expected from Marco Antonio, a Roman knight: "Il me va en l'entendement, que facilement je prendrois prisonnier ce seigneur, et que si je le pouvois attraper, j'étois riche a jamais. Car pour le moins, j'en aurois quatre vingt mille ecus de rançon, qui estoit son revenue d'un an, et n'estoit pas trop." From this it appears, that there were settled terms, upon which the captor and prisoner treated; and that these terms were generally agreed upon, at the rate of a year's income, *qui n'estoit pas trop*.

the

the English to make king John of France their prisoner at the battle of Poitiers, who was considered as the 10,000 l prize in the lottery. "Car chacun disoit, je l'ay prins; et certes il y avoit grand presse, et a grant peine pouvoit aller."

As we find by this statute, that the crown reserved two-thirds of the booty, and even the ransom of the prisoners, it may be supposed that in an Havannah expedition, the whole would hardly have been left in the disposal of the conquerors [A].

[A] It appears by Joinville's Life of St. Lewis, that the king of France was entitled to a third of the plunder from the Saracens, and the pilgrims and army to the remaining part of the booty.

STATUTES
The 28th chapter, of the 28th of this king, familiarly as
with a great deal of this, as well as many other statutes. By the
mind of Henry the fifth, it had been enacted, that no man
indignities, supposing others to have been committed in cer-
tain places (where no such place was to be found in the coun-
try) his statute, by express words, was only to continue till the next parliament after the return of
the king from France; and yet, in the 15th year of his reign,

STATUTES MADE AT WESTMINSTER,

3 Hen. VI. A. D. 1424.

THE second chapter of this statute hath a very extraordinary preamble, viz. that great numbers of sheep, with their fleeces on their back, and ready for shearing, were carried out of the kingdom into Flanders, and other parts abroad, to the great decrease of the customs, and the impoverishment of the kingdom. I can scarcely suppose (notwithstanding this preamble) that it would answer to carry sheep out of the kingdom merely to shear them and sell the wool; and I should therefore conceive, that this was a practice, which only existed in the imagination of the person who drew the act, and that no such allegation could possibly have been proved, before a committee of parliament. It is frequently said, indeed, that a preamble to a statute is the best key to its construction; it often, however, recites, that which was not the real occasion of the law [1], when, perhaps, the proposer had very different views in contemplation. The most common recital for the introduction of any new regulation, is to set forth, *that doubts have arisen at common law*, which doubts, frequently, never existed, and such preambles have, therefore, much weakened the force of the common law, in many different instances.

The 12th chapter, of the 18th of this king, furnishes us with a proof of this, as well as many other statutes. By the ninth of Henry the fifth, it had been enacted, that malicious indictments, supposing crimes to have been committed in certain places (where no such place was to be found in the country) should be utterly void. This statute, by express words, was only to continue till *the next parliament after the return of that king from France*; and yet, in the 18th year of his succeſ-

[1] There is a statute of Edward the Fourth, the preamble of which recites, that bad feathers in beds had been the occasion of a plague: feathers are never imported from the infected countries.

for, it is recited to be a doubt whether the statute was then in force "par opinion de ascuns *est expire*, par opinion des ascuns " *nient expire*." I would not from this compare the preamble of a statute, to the preamble of a patent of nobility; but only insinuate, that they should not be implicitly believed; nor are they always the true occasion or foundation of the law to which they are prefixed.

Not only the preamble, but the enacting part of this statute, seem not to prove any great wisdom or knowledge in the legislature of the times: it is *comparatively*, however, a better law than a statute of Queen Elizabeth [m] to the same purport, which makes it even felony to carry sheep out of the kingdom; whereas the penalty, by this law, is only forfeiture of the sheep. Most regulations of this sort will always be found ineffectual, and it is providential, that one country should want the product of another,

— "Non omnis fert omnia tellus;"

and thus the union between country and country is preserved, by the necessity of mutual intercourse and commerce [n].

The 5th chapter of this law directs, that commissions may be awarded under the great seal, to promote the navigation of the river *Lee*, from Ware in Hertfordshire, till it is lost in the Thames, and is the first instance of a parliamentary provision for the navigation of an inland river. I should imagine, that there had been very great losses by floods, at this time, on the estates in the fen countries; as, in the 6th year of this king's reign, provision is made for general commissions of sewers [o], where we likewise find the form of the first commission of this kind, which, perhaps, ever issued. It is directed to the commissioners for *Lindsey hundred* in Lincolnshire; and, amongst some other curious particulars, empowers them to press as

[m] 8 Eliz. ch. iii.

[n]

— γὰρ ἅλλε

"Ἄλλον ἔθηκε Θεός τ' ἐπιιδέα φῶτα. Θεός.

[o] This word is not a corruption of *shoars*, as some have supposed, but means a sea-wear or mound to keep off the sea; Raftall therefore, in his edition of the Statutes, generally spells the word *sewars*. See the title of 6 Hen. VIII. ch. x. as also other instances.

many labourers into their service as they should think necessary.

There is in Riley's *Placita Parliamentaria* [p] a law of this year, which is not printed in the statute-book, as it hath expired, together with the occasion of making it, unless it should be construed to be a general provision against the marriage of a queen dowager, without the king's consent.

“ *Petitiones Parliamenti de anno vi regni regis Henr. sexti.*

“ As toward a bille conceived and ministred unto the lordes
 “ spirituel and temporel in this parliament to be made for a
 “ statut, of the whiche the tenuer here followeth.
 “ Item ordene, soit stablye per auctorite de cest present
 “ parlement pur la salvacion de lonur des tresnobles Estats des
 “ royns *Dengleterre* pur le temps estants, qe nulle homme, de
 “ queconque estat, degree ou condicion quil soit, ne face con-
 “ tract des espousailles ou matrimoigne ne soy marie a quel-
 “ que *Royne Dengleterre sanz especial licence* et assent du roy
 “ mesmes, luy esteant des ans de discrecion; et celuy qui
 “ ferra le contraire, et ent soit duement convict, forface pur
 “ terme de sa vie au roy toutz ses terres et tenements sibien
 “ ceulx qui sont ou ferront en ses mayns propres, come ceulx
 “ que sont ou ferronts es mayns daultres a son aeps, et aussi
 “ tous ses biens et chateaux en quelconques mains quilz soient,
 “ considerez qe par la desparagement du royne lestat et lonur
 “ du roy ferroient tresgrandement emblemez, et dorra le
 “ greindre confort et example as autres Dames destat queux
 “ sont del sang roial pur le plus legierment desparager, We
 “ Herry Archbishop of Canterbury, John Archeb. of York,
 “ William Bishop of London, the Bishop of Ely, John Bi-
 “ shop of Rouchester, John Bishop of Bath, Will. Bishop of
 “ Norwiche, Richard Abbot of Westmynstre, Nicol Abbot
 “ of Glastingbury, William Abbot of Seynt Maries of York,
 “ and Nicol Abbot of Hyde, gife oure assente thus and never
 “ otherwise, that is to say, as far forthe as the said bille is
 “ not ageins the law of God and of his chirche, but standeth
 “ therewithe, and enporteth no dedly synne. Requiring this
 “ to be enacted in the parliament rolle.”

Dorso.

“ Soit enaëte en maner come tielx proteſtacions et condicions ont eſte enaëtez devant ces heures.”

It is a very extraordinary declaration, that the queen-mother ſhall not marry without the conſent of the infant king, who was now but four years of age; and if it is contended, that the “*du conſent du roy (luy eſtant des ans de diſcretion)*” means, that his conſent was not neceſſary till he was of ſuch age: the answer is, that this conſtruction would have made the act entirely nugatory, as it could not take effect till twelve years afterwards, when queen Katharine muſt probably have dropt all thoughts of marriage: and Grafton [q] informs us, that *Owen Tudor*, after the queen’s death, was committed to the Tower upon this ſtatute, from which he made his eſcape, either by the negligence or connivance of the conſtable.

[q] Chronic. p. 134. Jenkins, in his Centuries, likewise takes notice of this law.

STATUTES

STATUTES MADE AT WESTMINSTER,

8 Hen. VI. A. D. 1429.

IN the introduction to the statutes of this year (which consist of no less than eight-and-twenty chapters), Henry the Sixth is for the first time styled *Christianissimus Dominus Noster*; which title he had probably assumed as king of France.

The 2d chapter is of a very singular nature, as it is made to enforce a regulation of trade made by another country. *Christiern*, king of Denmark [*r*] (who was uncle to Henry the Sixth) had issued a proclamation, that no foreigner should carry any kind of merchandize to any of his ports on the coast of Norway, except the port of *Northbarn* [*s*], and this statute directs all Englishmen to observe this regulation under penalty of forfeiting their goods. The trade between England and Denmark, at this time, consisted chiefly in the exchange of wool for fish, or rather, indeed, in our fishing on their coasts [*t*]; for we find, by a statute made two years after this, that the *Danes* having seized the cargoes of some ships belonging to the merchants of York, and Kingston upon Hull, it is complained, that no *Danes* or *Norwegians* ever come into this island upon whom they can make reprisals [*u*]. The remedy given by the legislature is, that the complainants shall be entitled to letters of privy seal, and, if satisfaction is not made, that the king will then provide one.

[*r*] It is very remarkable that there hath never been a war between the English and the Danes since their invasion in the time of the Saxon government; and they are the only power in Europe from whom we have received assistance at home, except the Dutch and German troops in the war of 1743. The assistance from the Danes, which I would allude to, was in Ireland under king William.

[*s*] I suppose *Northbarn* is the same with *Bergen*: there is a town called *Bergen* on the island of *Rugen*, off the coast of *Pomerania*; and therefore *Bergen* (in Norway) seems to be properly called *North Bergen*, to distinguish it from *Bergen* in the Baltick. It appears by Anderson's history of Commerce, that there was anciently a considerable herring fishery in the Baltick, and particularly near *Rugen*.

[*t*] By an Irish statute of the seventh of Edward the Fourth, foreigners are not permitted to fish off the coast of Ireland.

[*u*] This shews, that by the *Law of Nations* (as then understood) there was a very summary method of receiving justice.

There

There is a proclamation in Rymer's *Fœdera*, which issued in the third year of Henry the Fifth, and which relates to this fishery on the coast of Norway and Iceland: "Rex vicecomi-
 "tibus Londoniæ salutem—Proclamari faciatis, quod nullus
 "ligeus noster usque ad finem unius anni proxime jam venturi,
 "ad partes insulares regnorum Daniæ & Norwegiæ, præfer-
 "tim ad insulam de *Iceland*, piscandi causa, seu aliis de causis,
 "in prejudicium regis regnorum istorum, accedere presumat
 "aliter quam fieri antiquitus solebat." It may be difficult, at this distance of time, to know what kind of fishery was carried on by the English on these coasts. As for the whale fishery, it is much doubted whether this was known unless it is inferred from the direction of this proclamation not to fish on the coast of Iceland. I should rather suppose indeed, that the whales, so far back as the beginning of the fifteenth century, were not to be taken or found in the extreme northern latitudes, in which they are fished for at present. I have already had occasion to observe, that the northern parts of Europe have gradually become warmer [*w*] than they were at the time of the Romans; and I should not think it improbable, that the seas in the high northern latitudes were at this time so frozen as to be incapable of navigation. This conjecture is founded upon something more strong than arguments of speculation. We hear eternally, in the old law books, of the king's prerogative in royal fish; which therefore, must have made a considerable branch of the revenue [*x*]; and *Juvenal* speaks of the *Balæna Britannica*, as we would at present of a *Greenland* whale. It is well known, that such fish is scarcely ever seen at present on our coasts; which, therefore, seem to have left our seas (as being too warm) for the more northern sea, where they find the climate more suited to their wants and feelings.

[*w*] It is observed, in the Philosophical Transactions (for the year 1676), that both *America* and *Iceland* were, within the last thirty years, become considerably warmer. The mildness in *America* is, at the same time, attributed to the common cause of the woods having been thinned; and it is extraordinary, that the same reason should not have been given for the change of climate in *Ireland*, as Oliver Cromwell cut down all their principal woods.

[*x*] I apprehend that the custom of sending a *present* (as it is styled) to the king, of the sturgeon caught in the *Thames*, arises from this ancient prerogative of the crown; as sturgeon is one of the *Royal Fish*.

The cultivation of North America hath, in the same manner, rendered their climate more mild than it was; and we find that within these few years great numbers of the spermaceti whales are caught in the Gulph of St. Lawrence, which before that was probably *too cold* for them.

STATUTES

STATUTES MADE AT WESTMINSTER,

15 Hen. VI. A. D. 1436.

THE first chapter of this law recites, that the court of the steward and marshal of the household (now commonly called the *Marshalsea Court*) had, by a fiction in the pleadings, supposed the plaintiff or defendant to belong to the king's household, who in reality had no such office, and by that means had improperly increased their jurisdiction: the statute, therefore, directs, that proof may be admitted against this allegation in the pleading, and by that means the suits are confined to those parties only, who are the proper objects of the jurisdiction of the court. This seems to be a very wise provision of the legislature, as all such fictions derogate from the proper weight and dignity in the proceedings of a court of justice. Use may, in some measure, have taken away from the ridicule of the fiction of a *quo minus* in the Exchequer, as well as other fictions; but the nature of them cannot be thoroughly altered so as to make that proper, which, in its commencement, was a ridiculous and false surmise.

The 2d chapter deserves only to be taken notice of, as it is the first permission to export corn to be found in the statute-book [y]. Agriculture must now have been greatly improved, as appears by Fortescue's description of England [z], which he says is a well-peopled (I had almost said paradise of a country) whilst he represents France to be an uncultivated desert. He might have, indeed, some national prejudices; but he had certainly great opportunities of comparing the two kingdoms as he was so long abroad with the son of Henry the Sixth.

[y] The words of the statute are, "Item pur ceo que null homme poet carier blees hors du royaume sans licence del roy, per cause de quel fermours ne poent vendre leurs blees sinon a baes prise, a grand damage de tout le royaume." The good policy of this statute, with the addition of the bounty upon exportation, hath made England the granary of the world.

[z] In his treatise *De Laudibus Angliæ*.

The 4th chapter directs, that no one shall sue a subpoena out of the Court of Chancery, without finding proper security, as this practice is recited to be "en subversion et impediment del common ley." The civil wars, during the reign of Henry the Fourth, must have greatly increased seoffments to secret uses and trusts [a] which the courts of common law either could not reach, or were unwilling to extend their jurisdiction to: this must have greatly encreased the business of the court of Equity [b] whose wings it was therefore necessary to clip. The inconvenience to the subject arose not only from the proceedings being more expensive and dilatory than by the common law, but likewise from the inexperience and ignorance of the judge of the court, whose office was rather the office of a secretary of state, than the president of a court of justice. The first person invested with this high office, who was properly qualified by a legal education, was Sir Thomas More [c].

Notwithstanding this first president, we find that queen Elizabeth gave the great seal to her vice-chamberlain, Sir Christopher Hatton, without any notice being taken, by the historians of the time, of the impropriety of this appointment [d]. In the reign of James the First, Archbishop Williams was appointed lord keeper; and Hacket, who wrote his life, says, that he dispatched many more causes than his predecessors [e] had done in the same time; and that the court had really a great deal of business (whilst he was lord keeper) appears by

[a] There is an Irish statute against these secret seoffments, so early as the third of Edward the Second, commonly styled the *Statutes of Kilkenny*.

[b] Williams (in his *Jus appellandi*) asserts, that the court of Equity in the Chancery begun in this reign under the chancellorship of Henry Beaufort, and in the time of Philip and Mary the entry was, "it is decreed by the Lord Chancellor and the whole court," p. 39 and 42. The rapid progress and increase of business in this court is amazing, as Sir Edward Coke, in the debates of the House of Commons (during the session of 1620) asserts, that, in the time of Henry the Sixth, no more than 400 subpoena's issued out of the Court of Chancery; whereas, in the reign of James the First, there usually issued 35,000, vol. i. p. 227.

[c] Roper, in his Life of Sir Thomas, informs us, that he read every bill preferred to him, and often stopped any further proceedings.

[d] Mr. Ravenscroft, in the same debates, asserts, that there never was any reference to a master in Chancery, till Sir Christopher Hatton was appointed to that office, which he likewise mentions to have arisen from this chancellor's ignorance of the business, which was to come before him, p. 305. There was also (the same session) a bill proposed, that there should be two judges of the *coiffassessors* to the Lord Chancellor, p. 352.

[e] Sir Nicholas Bacon and Lord Ellesmere.

this most irrefragable proof, that fourteen or fifteen serjeants, or barristers of great eminence, attended the Chancery, whilst he presided [f]. Notwithstanding this proof of the great increase of business in the court of Equity, there is not a report of a single decision by Lord Bacon; some few indeed (and those important ones) by lord Nottingham: we have hardly a determination of consequence by the great lord Somers; and though he was succeeded by lawyers of ability and eminence, yet it may be said, that we owe the present beneficial and rational system of equity to the peculiar national felicity of the greatest lawyer and statesman of this (or perhaps any other) country having presided in this court, near twenty years, without a single decree having been reversed, either in the whole, or any part of it: an infallibility, which in no other instance was ever the lot of humanity.

[f] Hackett's Life of Archbishop Williams.

STATUTES MADE AT WESTMINSTER,

20 Hen. VI. A. D. 1442.

THE 9th chapter of this law is the only instance of an explanation of any part of Magna Charta, though it hath been so repeatedly confirmed in almost every reign since that of Henry the Third. It recites a doubt, whether a peeress was to be considered as within the words of the known 29th chapter, “ Nullus liber homo capiatur, &c. nisi per legale iudicium parium suorum, aut per legem terræ [g].” There had now elapsed two hundred and seven years since Magna Charta was first enacted; and it seems at first rather extraordinary that no peeress had been tried for a capital offence, which must have before settled this doubt. The first reason for this seems to be, that the number of peers did not amount to a fourth of the number which they consist of at present; and the second is, that though perhaps peeresses might have joined with their husbands in the frequent treasons (in the ancient part of the English history) yet, to the honour of these more early ages, it was thought inhuman to prosecute a woman, as she was supposed to act under the coercion of her husband, and could not, from the imbecillity of her sex, contribute much to carrying the treason into execution, except by her good wishes for every enterprize in which her lord

[g] This statute was occasioned by the dutchess of Gloucester's being first prosecuted for treason, and afterwards for necromancy; prosecutions for this last offence were now very common, as appears by the many writs in Rymer, *De fortilegis capiendis*. The Rev. Mr. Harte (in his Life of Gustavus Adolphus) mentions, that he saw three witches hanging on the banks of the Sanna (a river in Austria), who had been convicted of blasting their neighbour's corn: it is greatly to the honour of this country, to have repealed all the laws against this supposed crime so long ago as the year 1736, when the laws of the same sort continue in full force against these miserable and aged objects of compassion, rather than persecution, in every other part of Europe.

was embarked: it was reserved for the reign of James the Second to prosecute lady *Lisle* for the harbouring a traitor.

It seems rather extraordinary that the peerage (who, like other bodies of men, are generally very tenacious of their privileges) should not have at this time insisted upon being tried for a misdemeanor by their peers, and not by a common jury, as the prejudices of such a jury are more likely to operate in a misdemeanor than in a capital offence. Surely the words "Nullus liber homo capiatur, aut imprisonetur, aut aliquo alio modo destruatur, nisi per legale iudicium parium suorum," seem to have been anxiously inserted to include every kind of criminal prosecution. It is indeed not only a provision in favour of the subject, by one of the chapters of *Magna Charta*, but seems to have been likewise the law of every part of *Europe*, where the feudal policy had been introduced. Thus *Thaumastieres* in his Commentary on *les assises de Jerusalem*, says, "Les nobles estoient juges par leur Paires, et les Bourgeois par autres Bourgeois, et prudhommes." He likewise cites *Beaumanoir* for this, "Se li jugemens fut fait par Bourgeois, je ne tins pas che pour jugemens, car il est fait par chaux qui ne puent, ne ne doivent juger." I have already, indeed, taken notice, that the same law prevailed in France, in the observations on *Magna Charta*; but I have since procured *Beaumanoir's Customs de Beauvoisis, et les assises de Jerusalem*, printed at Bourges in 1690, which afford this confirmation of what I have before advanced, and of which very curious and valuable works I shall have occasion to speak more fully, in the observations upon the statute of the twenty-seventh of Henry the Eighth.

By the enumeration of the ranks of peerage in this statute, viz. *Duchesses, Countesses, et Baroneses*, we may correct a mistake of the heralds, who inform us, that John lord Beaumont was created a viscount in the eighteenth year of this king; but it is impossible that the legislature, two years after this creation of a new rank

of nobility, should have omitted to enumerate it in the present statute, between the rank of countess, and baroness. This new rank was, however, instituted before the thirtieth year of this king, as the 30th Hen. VI. ch. ii. makes mention of it amongst the other degrees of nobility.

STATUTES

STATUTES MADE AT WESTMINSTER,

33 Hen. VI. A. D. 1455.

I HAVE before had occasion to observe, that the common law hath been weakened by the legislature's making declarations against offences, which were criminal by the common law, when properly understood. The 1st chapter, of the present statute, furnishes an instance of this, by providing a remedy against the servants of a deceased person, who, upon the death of their master, have riotously taken possession of his goods, and made distribution of them amongst themselves: there can be no doubt but that this was punishable by the common law, either as a riot or a larceny, according to the circumstances attending the case.

By the 9th chapter of the statute of the preceding year it is in the same manner declared, "that a bond, extorted from a woman whilst under confinement, shall be void;" and there can be as little doubt, but that a bond, so obtained, was clearly void by the common law. In like manner, the 24th chapter, of the 28th of this king, makes it felony for any Welsh, or Lancashire man, to take the goods of another, *under pretence of a distress*, which, being *in fraudem legis*, was most undoubtedly a felony by the common law. These three instances occurring within two or three years, seem to make it probable, that the drawing of acts of parliament was now in the hands of those who probably had not a legal education; and this observation receives a confirmation, from the figurative stile, and number of epithets, which are used in the 31st of this king, with relation to *Cade*, the Kentish rebel. "le plus abominable, tyranne, horrible, et errant faulx traitour John Cade," which number of epithets by no means agrees with the simplicity of the common law. The attorney-general, in opening the circumstances of guilt, which are to be proved against a traitor, may use oratory if he pleases (though perhaps better omitted); but the common law in the indictments speaks but one and the same language in every

every offence; and though many may think, that some parts of an old form might be dropt, yet it is much more prudent to adhere to it, as will strike any one, who reads an indictment, or charge, either in the French or Scotch law, which are drawn out to a preposterous length, and in which the advocate attempts to prejudice the judge, by rhetorical and figurative descriptions.

The 4th chapter of this statute directs, that no person, in the county of Kent, shall make above one hundred quarters of malt into beer or ale, for his own use, which is a very singular regulation, and for which I cannot even guess the occasion, if, perhaps, it had not been found in *Cade's* late rebellion (which arose in Kent) that it had been much fomented and increased, by the help of great quantities of this animating liquor (to an Englishman) in the cellars of the gentry of this country, and which the rioters, probably, made a very free use of.

The 5th chapter relates to the mystery of *silk-women*, which therefore should rather have been in *French* [b] or *English*, than in Latin. “Per gravem querimoniam sericatricum et filatricum (mysteria et occupatione operis serici infra civitatem London) ostensum fuit qualiter diversi *Lumbardi* et alii alienigenæ dictam mysteriam et omnes alias *virtuosas* occupationes mulierum prædictarum destruere, seipsos ditare, &c.” The law then directs, that any such *Lombard*, or alien, shall forfeit twenty pounds, half to the informer, and the other half to be applied in defraying the expences of the king's household; which clause may not, therefore, improperly be stiled the first *appropriation* act.

There are two or three things in this short statute, which, perhaps, deserve notice; the first is, that the cry, at this time, was against Italians, and Italian manufactures, and not against the French; the next is, that silk began to be used in dress, and that a great number of hands were employed, either in the manufacture, or in making habits from it [i].

[b] I find accordingly, that this is afterwards printed as a statute of 3 Edw. IV. ch. iii. in French. This shews how little those French statutes (which are not translated) have been attended to by the Editors of the statutes.

[i] I cannot imagine that silk was woven so early in England: ribbands are, however, mentioned in the statute.

The last more minute particular is, that it should seem this clause was drawn by some Lombard (who had quarelled with his countrymen established in England) by the expression of the *virtuosas occupationes mulierum* [k], which seems to be a translation of the Italian word *virtuoso*, in the sense it is commonly used; and regulations of this kind are seldom made, without the assistance of such impeachers, and false brethren.

The 7th chapter reduces the number of attornies, who are allowed to practice in the county of Norfolk, to six, on account of their being the occasion of unnecessary law-suits, which, from their *ignorance likewise*, they were not able to manage, for the true interests of their clients. It may, however, be said, that the ignorance of this parliament far exceeded that of the attornies complained of [l]. If there was not a proper number of persons educated to the profession of the law, the subject in this country would be under the same dependence, that the Romans were to those who undertook their causes, indeed, *without fee* [m], but thereby kept up a vassalage and dependence, improper, between citizen and citizen, in a free country.

This is the last chapter of the last statute of this reign, and I shall not attempt to consider Henry the Sixth as a legislator. His long minority, and weakness of understanding [n] when he arrived at more mature years, make him incapable of any

[k] Agreeable to this expression used by the legislature, of *virtuosas occupationes mulierum*, a lady's needle-work is still in Scotland called *her virtue*.

[l] By 4 Hen. IV. ch. xviii. it is directed, that the judges shall examine the attorney before he is admitted. This statute continues in force, though it is not the modern practice to comply with it.

[m] The Roman advocates, in the time of Trajan, were permitted to receive a fee to the amount of 10,000 sesterces (or about 80*l.* of our money) *after the cause was over*: "Suberat edicto SC. hoc. OMNES QVICQUID NEGOTII haberent, JURARE PRIUS QUAM AGERENT JUBEbantur, NIHIL SE OB ADVOCATIONEM CUIQUAM DEDISSE, PROMISSISSE, CAVISSE. His enim verbis "et mille præterea), et venire advocaciones, et emi vetabantur. *Peraclis tamen negotiis permittébantur pecuniam dumtaxat decem millium dare.*" Pliny, l. v. ep. 21.

[n] Some historians have attributed this to a severe fit of illness: it appears by some records in Rymer, that he studied Alchemy. If any person was supposed to be possessed of this invaluable secret, he was immediately considered as treasure-trove, or a royal mine, and the king detained him by a writ of, *ne exeat regno*. The Alchemists sometimes likewise had writs of protection, instances of both which may be seen in Rymer. Henry the Sixth was not the only king of England who studied Alchemy, some chroniclers have supposed the same with regard to Edward the Third. See also Sir John Davis on Tonnage; who says it was conceived that this king had purchased the secret from the famous Raymond Lully.

character,

character, whatsoever, in any relation of life : such a king could, possibly, be of no other use than that of the Roman consuls, in the fall of the empire, *to mark the year*. The want of spirit, or capacity, was so notorious in him, as to have prolonged his life even after his being deposed ; and by this he furnishes an instance in history, which contradicts the general observation, that the day of the confinement of a king, and his death are seldom far distant.

STATUTES

STATUTES MADE AT WESTMINSTER,

3 Edw. IV. A. D. 1463.

IT does great honour to Edward the Fourth, that in the 3d year of his reign (when his title to the throne was by no means a clear one, and the real king was alive) that out of fifteen chapters, which compose the only statutes of this session, thirteen should have been expressly made to promote the trade and manufactures of this kingdom. Instances are not very common of such an attention in kings, whilst in such a situation; especially in these more early times, when the benefits of commerce had been so little experienced, and that this king had these regulations much at heart, will appear by the observations on a statute in the twenty-second year of his reign.

The first chapter relates to our staple commodity of wool, speaks of the honour of it, as well as profit, and of the crimes and mischiefs which are the result of idleness. That this valuable manufacture may continue to maintain its credit, and just value in the foreign market, provisions are made against most extraordinary frauds, which are recited to have been made in the packing of wool, by putting into it earth, stones, sand, ordure, or (*pele* [o]), with intention to increase its weight. We often hear of cheats and abuses in manufactures at present, but I do not recollect any instance equal to what is recited by this statute: the modern world is certainly more knowing, but notwithstanding the general cry against the wickedness of the times, I doubt much whether the ancient saying is true, that *crescit in orbé dolus*.

[o] I give the word as in the original, the statute not having been translated: I should have supposed it to signify *bair*, but that would not have answered the purpose of increasing the weight. It might likewise have been used to signify skins, but I do not see how this fraud could have answered. It seems to be rather extraordinary, after the many complaints in different statutes of such deceits in the manufacturers and traders, that the rule of the law of England should be, *caveat emptor*.

The 4th chapter is thus entitled, *certain merchandises not lawful to be brought ready wrought [p] into the kingdom*. It enumerates almost every kind of goods which can be imported, and may be now looked upon as a fundamental law of the customs, founded upon the best principles of trade and commerce, which does not seem to have been so well understood in some of the following reigns, and particularly that of Henry the Eighth.

[p] As there are frequent prosecutions upon this statute, it is to be wished, that some of the enumerated commodities were more accurately translated,

STATUTES

STATUTES MADE AT WESTMINSTER,

17 Edw. IV. A. D. 1477.

THE monk who writes the history of *Crowland* abbey [q] informs us, that there were so many disorders and riots this year committed by the soldiers, on their return from the expedition to France, that Edward went in person, together with the judges, to try the criminals in different parts of England, “*Nemini etiamsi domestico suo parcens quo minus laqueo penderet, si in furto vel latrocinio deprehensus fuerit [r].*”

It is not extraordinary, that soldiers returned from a campaign should be inclined to continue the maroding and pilfering to which they had been (from want of discipline at this time) too much addicted in the enemy's country. We apprehend consequences from the breaking a few regiments when peace is concluded; but as there was now no regular pay or establishment for the army, except the short time which the expedition lasted, every one (the campaign ended) was im-

[q] Gale, vol. i. p. 559.

[r] Modern writers and statutes always speak of the criminal's suffering upon conviction; but ancient laws and chronicles generally speak of the *apprehension*, by which is meant detection, in what is called the *mainer*, or *furtum manifestum*. The old French word for *apprehended* is commonly spelt *prist* or *priet*, and not *pris*; hence an etymology, with regard to the word *culprit*, offers itself, which hath occasioned many far fetched conjectures. The common question asked the criminal is, *Culprit*, how wilt thou be tried; which is, in other words, *Criminal*, now *apprehended*, how wilt thou be tried? I have been informed (since the former edition), that this etymology is considered as far fetched. I do not mean to pretend to infallibility in this, or in other matters of more importance than etymology, in which there is generally a great deal of whim. I admit that it is liable to objection, but I would only beg those who object to it, to consider the more common accounts of the derivation of this word, and whether they are not still more refined, and liable to more objections. They will also consider, that this is a most ancient form used in the trial of criminals, and that *Culprit* is necessarily the vocative case. This word is likewise used by some of our oldest writers as a substantive, and synonymous with *wretch*, or person in a calamitous situation, which agrees with the sense I have contended for, viz. that of an *apprehended criminal*, or *prisoner*.

mediately

mediately dismissed, without any kind of precautions taken [s] to prevent the disorders which were naturally to be expected.

The discharged soldiers were not only guilty of pilfering on their return; they had likewise introduced the camp vice of gaming. The 3d chapter, therefore, forbids playing at *Cloish*, *ragle*, *halfbowle*, *handyn and handoute*, *quekeborde*; and if any person permits even others to play at such games in his house or yard, he is to be imprisoned for three years; as also he who plays at any such game, is to forfeit [t] ten pounds to the king, and be imprisoned for two years.

This is, perhaps, the most severe law which was ever made in any country against gaming, and some of these forbidden sports seem to have been manly exercises [u], particularly the *banding* and *handoute*, which I should suppose to be a kind of cricket, as the term of *hands* is still retained in that game. There is a very remarkable preamble to a law of *Provence* in *Du Moulin*, which prohibits the playing at cards or dice.

“ Item car jugadours als das, ou a las cartas, commeton de
 “ grans mals et destruction des beins, et aussique communement
 “ en tout jeu, si tan de grans renegaments, et blasphemements,
 “ de Dieu, et de la vierge Marie, et dels saints, et fantas
 “ de paradis, per las cals causas Dieu aucunement est ci
 “ corrousat, et nous punit par mortalitas, ou autras afflicti-
 “ ons [w].”

The

[s] The manner of raising and paying the armies appears by the 18th and 19th chapters of the twentieth of Henry the Sixth. The captains agreed by indenture with the king, to raise and pay such a number of men, and for a certain time. The kings of England used likewise, when they wanted soldiers for an expedition to France, to pardon criminals whilst they served abroad, provided they found security to answer any prosecution on their return, “ si quis adversus eos loqui velit.” See *Hal. Pl. Cr.* vol. ii. p. 145. and *Bacon on Government*, part ii. p. 11. The occasion of which conditional pardon probably arose from appeals for robbery and other offences being then very frequent; as the prosecutor, by indictment, was not entitled to restitution, till the statute of Henry the Eighth.

[t] All the forfeitures and penalties of this reign are applied half to the informer, and half to the expence of the king's household.

[u] In the eighteenth year of Henry the Eighth a proclamation issued against playing at cards or bowls; but Baker observes, that it was productive of greater misdemeanors: the same observation is made in the Roman-catholick countries during Lent, when publick amusements are forbidden.

[w] *Du Moulin*, vol. ii. p. 1244. The vice of gaming had been introduced into England before the time of Edward the Fourth, as Chaucer speaks thus of it :

“ As

The next chapter is calculated to prevent the encroachments of the courts Pipowder, which, like most other courts, wanted to extend its jurisdiction, or, in other terms, the profits arising from it. As these lowest courts of justice were under the direction of the steward, or auditor of him who had the grant of the fair, the steward, by way of drawing every litigation to his own court, supposed, by an *ingenious* fiction [x], that parties, who never made any contract at the fair, and who perhaps lived at a great distance, had made the bargain in dispute within the limits of his jurisdiction, and by this means claimed consuance of suit. The statute therefore directs, that the plaintiff, in the Pipowder court, shall swear, that his cause of action actually arose within the precinct of the fair, and the law seems to be effectually carried into execution [y], as we hear little of these courts at present. I cannot but here take notice, that the etymology of the word *Pipowder* seems to be mistaken by all the writers upon the law, who derive it from *pes pulvericatus*, or dusty foot; now *pied puldreaux*, in old French, signifies a *Pedlar*, who gets his livelyhood by vending his goods where he can, without any certain and fixed residence. In the *burrow laws* of Scotland [z], an alien merchant is

"As basard, riot, stewes, and tavernes,
 "Whereat with lutes, harps, and geternes,
 "Thei dauncen, and plaien at dice, night and day."

And again:

"Hazarde is very mother of lesinges
 "And of deccit, and curfed forfewearinges."

[x] I have already had occasion to observe upon these fictions.

[y] The law, perhaps, most effectually executed of any in the statute-book, is the statute of Charles the Second, which directs the sheriff to root up all the tobacco growing in the county.

[z] Ch. cxxxiv. These are generally published together with the *Regiam Majestatem*. I have in a note, p. 17. mentioned the honour of an ingenious treatise having been communicated to me, containing strong intrinsic proofs, that this book of the *Regiam Majestatem* is copied from Glanvil; since which however I find, that, by a Scotch act of parliament in the year 1425, "It is statute and ordained, that, six wise men and discreet, of ilke one of the three estates, quhilk knowes the lawes best, shall be chosen to see and examine the buikes of the law, that is to saye, *Regiam Majestatem*, et *Quoniam Attachamenta*, and mend the lawes that neids mendment." So that these books were at that time considered as the very foundation of the Scotch law, which a sort of transcript from the law of another nation could not have been allowed to be by the Scotch parliament.

called *ped puldreaux*, and likewise *ane fairand man*, or a man who frequents fairs; the court of Pipowder is, therefore, to determine disputes between those who resort to *fairs*, and these kind of pedlars, and low tradesmen, who generally attend them.

STATUTES

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STATUTES MADE AT WESTMINSTER,

22 Edw. IV. A. D. 1482.

THE first chapter of this statute is entitled, An Act of apparel ($\kappa\alpha\tau' \epsilon\lambda\omicron\chi\eta\nu$) as it repeals all former laws of the same kind: it not only directs of what materials the dress of each class of men shall consist, but likewise settles the length, and that no one, under the degree of lord, shall wear a gown or cloak which is not long enough to cover *ses cruches* ou *nages*. What is, perhaps, more singular than this part of the regulation, is twelve persons [a], particularly named, are excepted out of this statute, and indulged to dress according to their own fancy and whim.

The 4th chapter regulates the price of yew bows [b], which is not to exceed three shillings and fourpence; the words of the preamble reciting the great benefits to this country arising from archers are remarkable. “Item que come en le temps
“dels nobles progenitours del roy, et aussi en le temps
“del victorieux seigneur le roy qu’ore est, ses subgetz deins
“chescun part cestuy Royaume ount occupez et usez sagit-
“ture ove leurs arkes.” This king not only endeavoured to

[a] Most of them are knights, and I should conceive were always candidates for ribbands upon every vacancy: one of them is *Master John Guntborp*, dean of the king’s chapel.

[b] I should imagine, that the planting yews in church-yards (being places fenced from cattle) arose from an attention to the material from which the best bows are made; nor do we hear of such trees being planted in the church-yards of other parts of Europe. It appears by 4 Hen. V. ch. iii. that the wood of which the best arrows were made was the asp. It does not seem to be thoroughly settled by the Dendrologists, what makes the essential difference and distinction between the black poplar, and this tree, and therefore it would not be very easy to convict upon this statute. If this remark is considered as too minute, it must be recollected, that the *Elders* (according to the account in the Apocrypha) were convicted merely on the circumstance of their differing with regard to the kind of tree, under which *Susanna* was supposed to have committed adultery. It seems very singular, that all the statutes, for the encouragement of archery, should be after the invention of gun-powder and fire-arms. There is a statute so late as the eighth year of Queen Elizabeth, which relates to *bowyers*, and one of the regulations is, that every such tradesman shall always have in his house fifty bows made of elm, wirehafel, or ash. Ch. x. sect. 7.

promote archery [c] in England, but likewise made laws of the same tendency in Ireland; for by 5 Edw. IV. ch. iv. [d]. every Englishman is obliged to have a bow in his house of his own length, either of yew, wych, hasel, ash or awburn (alder probably); and by another statute it is directed, that butts shall be raised in every parish for the purpose of archery, which regulation is not introduced into England till the time of Henry the Eighth, and which may have been the occasion of some of those round hills of earth near towns, which have often amused, and puzzled the antiquary [e].

The present statute, which is the last of Edward the Fourth, is likewise the last in the French language. It continued, however, to be used much about the court, even so late as the reign of Henry the Eighth [f], as most of his love letters to Anne Boleyn, published by Hearn at the end of Avesbury's Chronicle, are in French. Anne of Boleyn left England early, indeed, for an education in the court of France (some writers say at nine, and others at the age of fifteen); but, as she not long after this returned to England, it cannot be supposed that she had entirely forgot her mother tongue. We find, likewise, by an epigram of Sir Thomas Moore's that the speaking it was much affected in the reign of Henry the Eighth [g]; it had not, however, the convenience which attends it at present, of being the general and common language of Europe.

[c] That most military man, and knight errant, Lord Herbert of Cherbury, who wrote so late as the reign of James the First, asserts, that good archers would do more execution, even at that time, than infantry armed with musquets. Carew, in his account of Cornwall, says, that *pricks* were the first occasion of the corruption of archery. I must own that I do not understand the meaning of this term, but submit it to those who still continue this healthy exercise. It is much used in the neighbourhood of Richmond, in Yorkshire.

[d] Irish Statutes.

[e] They are in Wales called *Tomonds*.

[f] We find, notwithstanding, by Leland's *Collectanea*, that it was part of the duty of those English clergy, who had livings in the neighbourhood of Calais, to teach the English language, vol. i. p. 46. Leland himself had one of these livings.

[g] Crescit tamen, sibi que nimirum placet,
Verbis tribus si quid loquatur Gallice,
Aut Gallicis si quid nequit vocabulis,
Conatur id, licet verbis non Gallicis,
Canore saltem personare Gallico.

At the battle of Shrewsbury, the word of the day was *Esperance*; it would not be very popular to give a French parole at present.

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This king reigned twenty-two years, during which he summoned nine parliaments; in some of which we find most wise regulations with regard to trade, and the promotion of industry. If the monk, who writes the history of *Crowland* abbey [b] is to be credited, he not only understood trade, but actually carried it on, after his accession to the throne, to his own private, and very great emolument. "Edwardus, comparatis navibus onerariis, et subtilissimis pannis, lanisque conquisitis, quasi unus hominum viventium per mercatutam, merces pro mercibus tam apud Italos, quam apud Græcos, commutavit." The profits which he made by this monopoly to the Mediterranean and Levant, are afterwards mentioned by the same author.

He began his reign by a most politic statute, the tendency of which was, to abolish the fatal disputes between the houses of York and Lancaster, and confirmed all acts of his predecessors, though he mentions them as kings *de fait, et nient en droit*, which is the first instance of these known words of a king, *de facto*, and not *de jure*, being introduced in the statute book.

He hath in other respects, perhaps, a better title to be considered as a legislator, than any other king of England, as he actually presided in the courts of justice, if we may believe Daniel. "Edward the Fourth, in the second year of his reign, sat three days together, during Michaelmas term, in the court of King's Bench, in order to understand the law [i];" and I have, on the seventeenth of Edward

[b] Gale, vol. i. p. 678.

[i] Trussel's continuation of Daniel's history, p. 184. The present king of Denmark (though of so tender years) presided in the supreme court of justice, and decided a cause on the 6th of March, 1766: it therefore seems to have been an ancient, and generally established usage in the north of Europe: and hence it may possibly arise, that some of the most ancient writers dwell much upon the necessity of a king's being learned:

"Car comme uns asnes couronnez,
"Est un Rois terrien sans lettre.
"Roy sans lettres, comme un asne seroit,
"S'il ne sçavoit l'écriture, ou les loys,
"Chacun de ly par tout se moqueroit."

And again:

"Roy qui ne sçet, est comme oisel en cage,
"Mais quant il est clerc, ou bon * Arciens,
"Ainsi sur tous, puet avoir avantaige."

* A Master of Arts.

the Fourth, already had occasion to observe, that he presided at the trials of many criminals. I do not mean by this to insinuate, that justice may not be more properly administered by the king's judges; but only that the same curiosity which carried him into the courts of Westminster-hall, must have likewise given him a desire still more minutely to inspect, and attend to, all parliamentary proceedings.

STATUTES

STATUTES MADE AT WESTMINSTER,

1 Rich. III. A. D. 1483.

THE reign of Richard the Third is a remarkable epocha in the legislative annals of this country, not only from the statutes having continued from this time to be in the English language, but likewise from their having been the first statutes which were ever printed [k]. We accordingly find by the 12th section of the 5th chapter of this law, exceptions in favour of scriveners, *alluminors* [l], *readers* [m], and printers of books.

The 1st chapter, with regard to secret feoffments and trusts, is only abridged in all editions of the statutes (except Rastal's) from which I shall insert it here at length [n], as lord chancellor Nottingham, in a manuscript treatise upon *trusts and uses*, is said to have excused the evasion of the twenty-seventh of Henry the Eighth in the courts of equity, by the statute of Henry the Eighth not being intended to extend to *all trusts*

[k] *Ames* (in his history of printing) informs us, that they are to be found in the Inner Temple library, as likewise in that of John Browning, Esq; The printer's name is *Macblynia*, or *Macblyn*; he was partner to John Letton; they are our most ancient printers, if we except Caxton: what are called private acts likewise begin with this reign.

[l] Illuminators, i. e. decorators of books; hence our word *limner*.

The king hath to this day an illuminator of letters to the eastern princes: *Dante* speaks of this art,

... e l'honor di quell' arte,
Ch' *alluminare* e chiamata in Parigi.

[m] Books (though printed) were now excessively dear, which makes me conjecture that the *readers*, mentioned by the statute, were booksellers, who received money from an audience, who were either incapable themselves of reading, or otherwise could not afford to purchase the books. Fitzherbert's Abridgement, in the reign of Henry the Eighth, sold for forty shillings; and the number of readers in the same reign was so small, that Grafton, in 1540, printed but 500 copies of the Bible. The same reason of the scarcity and dearness of books, seems to have been the occasion of establishing such professorships, as those of history, divinity, and indeed all sciences which do not require to be explained by experiments, and which seem now to be totally useless.

[n] I find (since the former edition) that this statute is printed by Mr. *Rusbead*, and I have therefore omitted it.

and uses, *but only to be co-extensive with this statute of Richard the Third.*

The 2d chapter enacts, that the subjects of this realm shall not be charged with *benevolence*; and the preamble recites, that many families had been absolutely ruined under these pretended presents to the king, but which were in reality extorted taxes.

The duke of Buckingham, who was so instrumental in procuring the crown for Richard the Third, says, "That the name of *benevolence* [o] (as it was taken in the reign of Edward the Fourth) signified, that every man should pay, not *what he of his own good will list*, but *what the king of his good will list to take* [p]." Henry the seventh, who succeeded, is known to have been so avaricious, that he soon broke through this most excellent and constitutional statute [q]; and in the year 1526, Henry the Eighth having demanded a benevolence from the city of London, one of the common-council objected to the paying it, citing this act of Richard the Third. He moreover added (in the presence of Cardinal Wolsey) that some persons coming before his grace, might, through fear, grant so much, as not to be able to pay their own debts, and their families might ever after rue the indiscretion of so lavish a grant. To this the cardinal did not answer, but with regard to this statute of Richard the Third, he said, "*He was an usurper, and a murderer of his nephews, and that the laws of so wicked a man should not be enforced*" To which the common-council then answered, that "*though he did evil, yet were many good statutes made, not by him only, but by the consent of the whole realm in parliament* [r]."

The 3d chapter enacts, that every justice of peace may let a prisoner to mainprize, and that his goods shall not be seized till he is attainted. This is a most excellent and humane

[o] It is proper, after this statute hath abolished benevolences, that the clerk, when the king passes bills, should say, "*Le roy remercie ses bons sujets, et accepte leur benevolence*?"

[p] Sir Thomas More's Life of Richard the Third; or rather, according to Buck. Dr. Morton's, though published by Sir Thomas.

[q] See 11 Hen. VII. ch. x. which is entitled, *A Remedy, or means to levy a Benevolence before granted to the King.*

[r] Stow's Chronicle, p. 525.

law, which became necessary from the justices of the peace beginning now to execute their very useful and necessary office [s], and though they had a power to commit, yet it should seem, that they had not a power of bailing, which must have frequently been the occasion of unnecessary delays in imprisoning the subjects, as well as great expence in applying to other jurisdictions.

The power of taking bail in all but the most atrocious and dangerous offences to the public, seems to be a necessary consequence of the criminal being presumed innocent, till conviction; and therefore it is only required, that he shall be amenable to justice. It is one of the Athenian laws in Petit's collection [t]; and *Chaumau*, in his history of *Berry* [u], mentions, that the citizens of Bourges cannot be committed, provided, "*quils baillent bonne et suffisante caution, hormis en cas de crime de lese majeste.*" Which, as the customs of the several provinces do not materially differ, may be presumed to be the general law of France.

The 4th chapter is made to restrain certain aliens from carrying on any trade or merchandize in this country; and it is remarkable, that the *Venetians*, *Genoese*, *Florentines*, *Apulians*, *Sicilians*, *Lucaynens*, and *Cateloins* [w], are enumerated, without any notice of the French, or even their provinces to the *Mediterranean*. Bishop Godwyn, in his life of Henry the Eighth, mentions, that in the year 1517, there were great insurrections in London on account of foreigners being employed, and on that occasion, with great force and liberali-

[s] In the year 1515 (being thirty two years after the present statute) was published, *the Jusis of Peas*, which shews that the new powers given to this magistrat, in that short space of time, did not make it safe for him to act without such assistance. The ancient Conservator of the Peace had little more to do, than commit offenders.

[t] Οὐδὲ δύνω Ἀθηναίων εἰδὶν ὅς ἀν ἐξουσίας τρεῖς καδίην; treason against the state and burglary are indeed excepted. Thus likewise by the Roman law, "In vincula non conjiciendus est reus, qui fidejussores idoneos dare poterit, nisi tam grave scelus admisisse eum constat, ut neque fidejussoribus, neque militibus committi debeat." Dig. lib. xlviii. t. iii. c. 3.

[u] Printed at Paris, 1556.

[w] I should suppose that the *Cateloins* here mentioned are the inhabitants of Catalonia; they are, however, stated to be Italians by the statute, and I have before this had occasion to observe, that the geography of the legislature was not, anciently, very accurate.

ty of resentment, expatiates against the absurdity of such restraints.

Richard the Third did not reign long enough to hold more than this session of parliament; and yet he hath obtained, from most historians, the character of a great legislator, from this very short and imperfect specimen of what rather he intended to do for this country, than what he either had really done, or had an opportunity of carrying into execution. Baker, in his chronicle, commends much the laws of Richard the Third, and says, that he took the ways *of being a good king*, if he had come *to be king, by ways that were good*. But he hath a much greater testimony in his favour, no less than Lord Bacon, who says, that he was a good legislator *for the ease and solace of the common people* [x]: I shall not mention, in addition to these, the authority of Buck, who is a professed panegyrist. There is certainly a sort of fashion (if I may be allowed the expression) which prevails at different times, with regard to the characters of kings, and great men. Richard hath generally been represented, both as a monster in person and disposition: if we may believe *Buck*, and the countess of Desmond [y], he was remarkably genteel, and the best of kings and men. It will be probably right to steer between these extremes, and as far as relates to him as a legislator, the 2d and 3d chapters of this his only collection of laws will for ever shew, that he meant well (at least upon his accession) to the constitution and liberties of the subject.

[x] Life of Henry VII. p. 2. Macbeth, another usurper, is celebrated by Buchanan for his excellent laws.

[y] Lord Bacon mentions (in his history of Life and Death) that this countess of Desmond lived to the age of 140 years, and that she had three different sets of teeth. She had danced with Richard the Third at a ball, and said he was well made, and a good dancer.

The Second Parliament of the Third Year of H E N R Y VII.

A. D. 1486.

TH E preamble to the first chapter of this law deserves notice, not only as it is by some supposed to have first established [z] the court of star-chamber, but likewise as it makes mention of the prevailing crimes of this time, which were supposed to call for the interposition of this extraordinary court. "The king our sovereign lord remembereth, how
" by our unlawful maintenances, giving of liveries, signs,
" and tokens, retainers by indenture, promises, oaths,
" writings, and other embraceries of his subjects, untrue de-
" meanings of sheriffs in making panels, and untrue returns
" by taking money, by juries [a], &c. the policy of this
" realm is most subdued." Lord Bacon, in his history of Henry the seventh, speaks highly of this court and its powers: I shall not cite his words; as he was so great an ornament to humanity, that his failings should not be dwelt upon, but only mentioned as a proof, that he was but man.

It is well known, that the power and jurisdiction of this oppressive court is now entirely abolished: we find, however, in the appendix to the second volume of Rushworth's Collection, many cases there determined, which may deserve the perusal of every lawyer, though he is often to distrust the law contained in them: it does not follow, notwithstanding, that, because it is a star-chamber case, every part of it may not be considered as law even at this day. The number of judges was from twenty-six to forty-two [b]. The lord chancellor

[z] This court is not mentioned to be held by the name of *the Star-chamber* till 19 Hen. VII. ch. xviii.

[a] I have followed the punctuation in the common editions of the statutes; it should however be printed, "by taking of money by juries." It is well known, that in records there is no punctuation, and perhaps the statutes should be so printed, as the wrong idea arising from the improper punctuation is not easily removed.

[b] Whitelock asserts, that every privy counsellor had a voice in this court. Comm. Parl. Writ, vol. i. p. 94. The privy council, in the time of Charles the First, did not probably exceed the number of twenty-six.

presided; and if the voices were equal, he gave the casting vote. In the time of Charles the First, the fines were often so severe, that the audience assembled to procure places at three o'clock in the morning, from the same motive that there is the greatest croud about the table, where the play is deepest. Before the statute of the sixteenth of Charles the First, the court of the marches, and the courts of the dutchies palatine, had nearly the same jurisdiction with the star-chamber.

[c] Rushworth, vol. li. p. 1383.

STATUTES

STATUTES MADE AT WESTMINSTER,

4 Hen. VII. A. D. 1487.

THE 10th chapter of this law enacts, that no French wines, or Tholouse woad, shall be brought into this country, but in English bottoms. Lord Bacon, in his Life of Henry the seventh, observes, that all the ancient statutes (before this) encouraged the bringing commodities by strangers, having regard to the cheapness of the commodity, rather than the increase of the naval strength of the kingdom. It is very plain, that this great man's extensive knowledge and reading did not include the statute-book, as I have already observed upon two or three statutes, with directly the same tendency; and this very statute only re-enacts what was law before.

The 13th chapter of this law recites, that whereas, upon trust of the privilege of the church, diverse persons *lettered* have been more bold to commit murders, rapes, robbery, theft, and all other mischievous deeds; therefore if the person is not within holy orders, he is to claim the benefit of clergy but once; and upon being convicted of murder, he is to be marked with the letter M on the braun of the left thumb; and if for any other felony, with the letter T [d].

This is the first statute, which, in any measure, took away what is called the benefit of clergy [e]. As a *ctual* reading was

[d] The letter M was plainly intended to denote the person had been convicted of *murder*; and T denoted a conviction for *theft* (that being the most common felony, as appears by every calendar of criminals): thus by 21 Hen. VIII. ch. ii. (which is printed at length by Raftall) all persons who shall *abjure* the realm, are to be marked in the hand with the letter A. The present statute is by no means clearly worded; it is not, therefore, extraordinary that Bishop Burnet, in his history of the Reformation, should mistake in saying, that by this law, the clergy were to be burnt in their hands. The bishop is, however, generally very accurate with regard to points of law; and it is not improbable that his history was revised by his great patron, Sir Harbottle Grimstone, who was master of the Rolls. His being likewise chaplain to Sir Harbottle, must have introduced him to the acquaintance of the great lawyers of the time; in his history, he occasionally gives us their characters, as of *Pollexfen*, Sir Orlando Bridgeman, &c.

[e] It is properly the *privilege of learning*, as *clergy*, in old French, signified *science*, or learning, as appears by the old proverb: *Un poignet de bonne vie, mieux vaut*

was at this time required [f], of which few common felons were capable, this most extraordinary privilege and indulgence had not so extensive and bad consequences, as it would be attended with at present. It is true, that it now seems to be a most absurd privilege; and though I will not insist upon its being in all respects a most wise, and humane indulgence, so as to be an advocate for it, yet we are certainly not to judge of the propriety of it, by the present state of this country:

Formerly none but clergymen could read [g]; and men so well provided for as the clergy were at this time, and who had a more liberal education than the other ranks, and classes of people, were not often guilty of the offences which swell the calendar at a gaol delivery. It is well known, that nineteen criminals out of twenty are indicted for larceny; and this they had not the common temptation to in the poorer people, viz. that of want, or narrow circumstances.

With regard to those who were not clerks (and consequently could not read) it was a high offence for any one to instruct them during the time of their imprisonment, so that they might be enabled to plead the privilege at the time of their trial. We find, therefore, in the book of *Affises* [h], that, amongst the articles to be given in charge in the King's Bench, there is one "des Gardiens des prisons qui apprennent les laiz persons qui sont en leur garde, lecture, per cause de salvation de leur viz et disturbance de la common lye, que la justice ne se puit parfaire per eux, comme sur laiz gens, en deçoit del roy."

vaut qu'un moine de clergie. I should apologize for here mentioning, likewise, the signification of another old French word, in the motto of the order of the garter, as it hath no relation to the present statute. *Beaumont* (who wrote in the time of *Phillipe le Bel*, cotemporary with *Edward the Third*) uses the word *bouny* for *disbonour d.* The signification of that motto therefore is, "may be meet with dishonour, who thinks ill of the order and institution."

[f] Lord Bacon says, that the whip was to prepare the book, and the judge was to turn to what part he should think proper, vol. ii. p. 378. This contradicts the generally received tradition, which is, that the criminal was tried in reading a particular verse of the Psalms.

[g] It hath already been observed on the seventeenth of *Edward the Fourth*, that many belonging to the king's household were executed for larceny in the year 1477. These criminals therefore could not read, otherwise they would have been entitled to their benefit of clergy.

[h] P. 138.

Besides

Besides this, the clergyman underwent a trial before the ordinary [*i*], who, though a favourable judge, yet may be presumed to have sometimes inflicted very severe ecclesiastical punishments; and there is an instance mentioned by *Carte*, of a clergyman's being not only degraded (in the time of Henry the Second) by sentence of a court christian, but likewise branded in the cheek with a red-hot iron [*k*].

With regard to the punishment of branding inflicted by this statute, it is directed to be on the left hand, both from fear perhaps of mutilation, as also from its not exposing the criminal to so public a shame; the left hand not being so frequently used as the right hand. When the branding was afterwards changed from the thumb to the cheek, by a statute of queen Elizabeth, the preamble of the statute of king William (which re-establishes this first method of branding on the left thumb) recites, that, by the mark being more apparent, the criminals became more abandoned [*l*].

As transportation is now become the most common punishment [*m*] of criminals since the establishment of our colonies in America [*n*], it may not be improper here to consider, whether it continues to answer the purposes, for which this mode of punishment was originally instituted. Our American settlements are now in such a state of prosperity, that it cannot be supposed to carry with it the terror, that it did in the last century: it should, therefore, seem proper, that the condition of pardon should now be, that the criminal be transported to Hudson's Bay, or some of the new colonies in East and West-Florida [*o*]. It was thought in the fourteenth and fifteenth centuries to be so dangerous a voyage to the East,

[*i*] He who claimed benefit of clergy, was prisoner to the ordinary for life. State Trials, vol. i. p. 367.

[*k*] Vol. i. p. 581.

[*l*] "*Coli rura ergastulis pessimum est, damnatis manus, inscriptis vultus*" Pliny.

[*m*] The first statute, which inflicts the punishment of transportation, is the 39 Eliz. ch. iv.

[*n*] It is likewise the punishment in all other countries, who happen to have colonies: thus the *Danes* transport to *Tranquebar*, and the *Spaniards* to the least cultivated part of their very extensive dominions of desert in South-America.

[*o*] I have been informed (since the former edition), that East-Florida is a very healthy climate, I would therefore confine what is said to West-Florida. It appears by Sir *John Strange's Reports*, that when, after the peace of Utrecht, we became first possessor of Mahon, the criminals were frequently transported to Minorca.

or West-Indies; that the crew of both *Columbus* and *Vasquez de Gama* [p] consisted in part of criminals, who were pardoned upon condition of embarking in those expeditions; and, long after this, they were supposed to be liable to still greater dangers on shore. These terrors are now in a great measure vanished; and the passage is almost considered as a voyage of pleasure, during which they are perfectly idle, and therefore in the very state they would wish. When they are landed, they are exposed, not to wild beasts and savages, but become servants to their own countrymen, who speak the same language, and have contracted the same habits of living, to which they have been used in the mother country. It should therefore seem, that the place to which the criminals are transported [q] should be altered, or perhaps a new punishment substituted in the room of it. Confinement in the dock-yards hath been proposed in parliament; and the bill passed the lower house without any material opposition.

Maupertuis, in one of his dissertations, hath advised likewise that criminals whose lives are forfeited, should be pardoned, on condition that some hazardous experiment for the promotion of medical knowledge, may be tried upon them. Those who start at the supposed inhumanity of this proposal, should consider whether certain death, or a chance of surviving, is the greater mercy to the criminal; and surely this milder punishment is not more severe, by the probability of the experiment's becoming of general utility to mankind; the practice of inoculation was first tried upon some criminals, who not only survived themselves, but have saved, and will continue to save, the lives of thousands [r].

I cannot pass unnoted the 24th chapter of this law, as Lord Bollingbroke, and many other writers, have styled it (*κατ' ἐξουχίαν*) *the statute of alienations*, and have dated the power and

[p] Herrera.

[q] I have been informed, that there hath been an instance within these twenty years of a criminal rather chusing to be executed, than transported: this instance, however, is too singular to be argued from.

[r] It appears by the Philosophical Transactions, for the year 1667, that the transfusion of blood, from which so great benefits were at that time expected, was tried upon *Anthony Maurea*, who is stated to have been a madman; but it is supposed that his madness did not appear, till after his condemnation at the *Chatelet*.

influence of the commons as commencing, from prepetuities and entails being now first broken through and abolished. This is an instance (amongst many others) how little laymen (if I may so call them) ever look into the statute-book, or, looking, *understand not*. It is only necessary to read the statute to refute these crude and bold assertions; and the estate of a tenant in tail is so far from being destroyed by it, that his interest is saved, if he makes any claim within five years [s]. The power of alienation, therefore, at this time did not arise from this statute, as supposed, but from the determination of the judges in *Takiam's case*, in the reign of Edward the Fourth, by which that most extraordinary of legal fictions, the common recovery, was established. This statute is indeed very inaccurately and obscurely penned, which is recited by 32 Hen. VIII. ch. xxxvi. and which, five-and-forty years after the passing this law, binds the tenant in tail immediately, without allowing him the five years to pursue his claim. Lord Bacon, in his life of Henry the Seventh, speaks thus of this statute: "As the king himself had in his person and marriage made a final concord and agreement in the great suit for the crown, so by this law he settled the like peace in private possessions of his subjects. Lord Bacon further adds, that "this law only revived a more ancient statute [t], which was likewise made in affirmance of the common law." He then observes, that "statutes of *non claim* are proper for turbulent times, as statutes, to quiet possessions, are for peaceable ones."

The statutes of the present, and the next session of parliament, were printed by Wynken de Worde, and likewise by Julian Notary in 1503: it is said likewise, that now first began the custom of prefixing titles to the statutes [u]. A title is no part of a statute (properly speaking) it not being read

[s] It seems to have been conceived by some indeed, that the tenant in tail (*party to the fine*) was bound by this statute, which is very confused and inaccurate; but it appears by the title and preamble, that the chief intention of the legislature was by no means to give the tenant in tail any new powers of alienation, but only to make fines with proclamations, a most complete bar against dormant claims.

[t] Statute of Edward the Third.

[u] Lord Raym. 77. Hardr. 324. Instances have however before this occurred.

three times (as every other part of a law is) and is only proposed when it is to be sent from one house of parliament to the other. As arguments are, however, frequently drawn from the title of a statute, it is to be wished that there was a little more attention to the settling of it. For example, who would expect to find a most material alteration in the statute of *distributions*, in a law, the title of which is, *An Act for the revival and continuance of several acts of parliament* [w]; and indeed it is impossible, when statutes relate to matters of a very miscellaneous nature, that the title can be co-extensive with the views of the legislature: it is, therefore, to be wished, that such acts of parliament were distinct laws, and not thrown together in that very strange confusion, which hath now obtained the name of a *hodge podge* act. It must be admitted, that the ancient statutes, however, are much more faulty in this respect, than the more modern ones: some titles to statutes are even ridiculous, as 19 Hen. VII. ch. vi. *Pewterers Walking*.

[w] 17 James II. ch. xvii. sect. 2.

STATUTES

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STATUTES MADE AT WESTMINSTER,

11 Hen. VII. A. D. 1494

THE first chapter of this statute is a most humane and wise law, made for the protection of those who have assisted and supported the king in possession of the crown, whether his title be a good one or not, as the preamble recites it, "*to be the duty of the subject to serve their prince, and sovereign lord for the time being [x].*" Henry the Seventh was now in peaceable possession, and we must look upon the statute to have been chiefly made with a view to secure the crown to himself and his descendants. Every subject was now strongly interested to appear in arms on his behalf; as if they were overcome by the *Perkin Warbeck*, or other pretender, they might still plead this statute to protect their persons, and fortunes. After the restoration, many who had submitted to the parliament and protector, insisted upon the equity of this statute, which was denied them, upon a strict construction of the word *king*, and it is wisely observed in the *Considerations on the law of forfeiture*, that the construction of a statute of this kind, *will always be a political one*. Lord Bacon [y] calls this statute a law of a strange nature, *more just than legal*, and *more magnanimous than provident*: the distinction, however, between *just* and *legal* does not seem to be a

[x] What acts of a king *de facto*, and not *de jure*, shall bind his successor, was agitated in the case of *Bagot and Ivet*, which is reported in the Year Book of the ninth of Edward the Fourth, and during the terms of Hillary and Trinity of that year. It is very difficult to say upon what points the court determined, but it should rather seem that the judges were of opinion, that all acts of the king *de facto* (which were not highly prejudicial to the great and fundamental rights of the crown) would bind the successor; nor do the judges or counsel seem to consider it as tender ground. See also Bedford's * Hereditary Right of the crown of England, p. 111, & seq. It is likewise mentioned in the Year Book of the fourth of Edward the Fourth, Term Pasch, p. 20. that Sir *Ralph Grey* was beheaded, "*per cause de son perjury, et doubleneis que il avoit fait al Roy Henry le sixe jadis Roy, et auxi al Roy Edward le Quart, que ore est.*"

[y] Life of Henry the Seventh.

* I am informed that this book, though usually ascribed to the Rev. Mr. Hilkeiah Bedford, was in reality written by the Rev. Mr. Harbin, and the preface, by the Rev. Mr. Theophilus Downs.

very clear one, or to do honour to the sentiments of this great writer.

The 4th chapter settles the cities and towns which are directed to keep a standard for measures. I have had occasion to remark, in the observations on Magna Charta, how ineffectual all regulations of this sort have ever been in all countries; and one great reason for every one's being unwilling to submit to them, arises from the abuses of office in the clerks of the market, who are to carry them into execution, but only make use of their powers, for the purpose of extortion [z]. This is dwelt upon in a charge, which was given by Sir Edward Coke to the grand jury of Norhich, in 1607. His words are these: "The clerk of the market will come down, and call before him all weights and measures: if there is a fault, he and the informer share the penalty, but never redress the abuse: it was once my hap to take a clerk of the market in these tricks; but I advanced him higher than his father's son, by so much as from the ground to the top of the pillory. If you of the jury, therefore, will present these offences, by God's grace they shall not go unpunished, for we have a coif, which signifies a scull, whereby, in the execution of justice, we are defended against all oppositions [a]." It must be admitted, that the chief-justice seems to express himself with rather too great warmth against this abuse; but as it was the first charge which he had occasion to deliver in his native county of Norfolk, he seems to have been rather too desirous of popularity.

The 17th chapter is entitled, *The forfeiture for taking of fessants [b] and partridges, or the eggs of hawkes [c] or swans*. The preamble recites the great injury to lords of manors, not only from the loss of the *pleasure and disport* to their friends and servants, but likewise the loss to *their kitchen and table*.

[z] See Riley's Pl. Parl. p. 568.

[a] An information was moved for against the clerk of the market for extortion, even so late as the sixth of George the Second, Barn. Rep. p. 310.

[b] In the time of Queen Mary, there was not only a keeper of pheasants and partridges to the queen, but likewise a *taker*. The kings of England had also, formerly, a swanherd, and Sir Edward Coke makes this office one of his titles in the fourth Institute.

[c] Notwithstanding the penalty for taking the eggs of hawks, the falcons of this country were never in great repute; the more northern the latitude, the better the falcons, and those of Iceland are particularly famous.

ἀποκτείνῃ, ἢ τέκον, ἢ τε αἰκλόν, τεθνήσκει ἀνάγκη [g]. The destroying of birds nests is forbidden, Deut. xxii. 6.

The 21st chapter recites, "*That perjury is much and customarily used within the city of London, amongst such persons as passen and been impannelled in issue, joined between party and party.*"

The offence of perjury hath been before this statute complained of in preambles to several laws [b]; and, what is very singular, it is always the perjury of a juror, who finds a verdict contrary to his oath, and not the perjury which we hear too much of at present, in the witnesses produced at a trial.

In the *dance of death*, translated from the French in this king's reign, with some additions to adapt it to English characters, a juryman is mentioned, who had often been bribed for giving a false verdict [i], which shews the offence to have been very common.

It is likewise remarkable, that this partiality and perjury in jurors of the city of London, is more particularly complained of than other parts of England, by the preamble of this and other statutes. Stow informs us, that, in the year 1468, many of the jurors of this city were punished, by having, papers fixed on their heads, stating their offence of being tampered with by the parties to the suit. He likewise complains, that this crying offence continued in the time of Queen Elizabeth, when he wrote his account of London; and Fuller, in his *English Worthies*, mentions it as a proverbial saying, *That London juries hang half, and save half.* Grafton also, in his *Chronicle*, informs us, that the chancellor of the bishop of London was indicted for a murder, and that the bishop wrote a letter to Cardinal Wolsey, in behalf of his officer, desiring the attorney-general would stop the prosecution, *because London juries were so prejudiced, that they would find Abel guilty of the murder of Cain.* The punishment for the false

[g] Euterpe, ed. Gale, p. 115.

[b] 38 Edward III.

[i] The sheriff, who returned the jury, was likewise greatly accessory to this offence, by returning the most partial and prejudiced jurymen. Carw, in his account of Cornwall, informs us, that it was a common article in an attorney's bill, to charge *pro amicitia vicecomitis*.

verdict by the petty jury is by writ of attaint [k]; and the statute directs, that half of the grand jury, on the prosecution, shall be strangers, and not Londoners. There is no statute against the perjury of a witness till 5 Eliz. ch. ix. Is it not therefore extraordinary that the Mexicans [l], when first conquered by the supposed more civilized Europeans, should have punished this offence with death?

[k] It appears by 15 Hen. VI. ch. v. (which likewise recites the great increase of perjury in jurors, and in the strongest terms) that in every attaint there were thirteen defendants, viz. the twelve jurors who gave the verdict, and the plaintiff or defendant who had obtained it, and who therefore was supposed to have used corrupt means to procure it. For this reason, if the verdict was given in favour of the crown, no attaint could be brought, because the king could not be joined as a defendant with the jury who were prosecuted.

[l] Herrera.

STATUTES MADE AT WESTMINSTER,

19 Hen. VII. A. D. 1503.

THE seventh and last chapter of this statute is entitled, briefly, *murder*: the preamble recites, that one *James Grame, yeoman*, had murdered his master *Richard Tracy*, at Brentwood, in Essex: the criminal, as the law then stood, having a right to claim the benefit of clergy [m], this statute deprives him of this privilege; and likewise enacts, that if any lay person, afterwards, shall murder his lord, master, or sovereign immediate, he shall not be allowed to plead his clergy [n]. I should therefore, think, as the preamble recites this particular case of petty treason, and concludes by taking clergy from those who should be convicted of this species of murder, that, though the word *murder* is used in one part of the preamble, the true construction of this law, which in effect punishes with death (though the most crying of offences) should not extend further than to petty treason, though the title makes no mention of petty treason, but on the contrary consists of the single word, *murder*. This doubt, which I have ventured to state, is now become a mere point of speculation, as 23 Hen. VIII. ch. i. hath expressly taken away the benefit of clergy from murderers. I should be inclined, however, to think, that those criminals, who may have been ex-

[m] In the fourth year of Henry the Eighth, the abbot of Winchcomb preached against the taking away this privilege, upon the text of *Nolite tangere christos meos*; he was opposed in that convocation with great warmth and liberality of sentiment by Dr. Standish. Burnet's Hist. Ref. vol. i. p. 12.

[n] I find but one instance of a criminal's not claiming the benefit of clergy, which is that of the duke of Somerset. Hayward, in his life of Edward the Sixth, p. 137. Quarto. It appears, however, by Bishop Burnet's account of his trial, that he had no counsel to assist him, and therefore might possibly be ignorant that he was entitled to this privilege. We have indeed no very accurate relation of this duke's trial; the form of the indictment, however, is inserted in Coke's Entries, p. 482. by which it appears to have been a complicated charge of treason and felony, and therefore most certainly illegal. His peers acquitted him of the treason, and it is generally agreed that the evidence of the felony (of which he was found guilty) by no means brought his case within the statute, upon which the prosecution was endeavoured to be supported.

ecuted between the present statute's passing and the twenty-third of Henry the Eighth, did not suffer according to law.

It seems, indeed, very extraordinary, that this most horrid of crimes should have been entitled, for so many centuries, to such a false mercy and indulgence: I have, however, before observed, that this privilege, anciently, could only be claimed by those few who could actually read, and that if any one presumed to teach a criminal whilst in prison, it was considered as a misdemeanor. It likewise seems most extraordinary, that this horrid crime should have been punished capitally in so few countries, when not only the dictates of natural justice seem to require such a retaliation and atonement, but likewise by the most ancient of all laws, that of the Jews [e], *blood was to be shed for blood*.

In the Homeric times, murder was punished by a wergild, or banishment.

καὶ μὲν τις τε κασιγνήτοιο φονεῖο
Ποινὴν, ἢ δ' αἰσῶδες ἐδίδασκε τεθνεῶτος
Καὶ ῥ' ὁ μὲν ἐν δ' ἡμῶ μινε αὐτῶ, ὡμῶ ἀπολλίου,
Τὲ δ' ἐπ' ἐργασίῃ κρεδὶν ἐν θυμὸς ἀγύνηρ,
Ποινὴν δεκάμινε
Iliad. i. 629.
ταῖς ἀπὸ παλαιοῖς, ἀνδρῶ κατὰ τὴν II. O. 335.

There are likewise passages in the *Odyssey*, which shew, that the murderer was not looked upon with horror, as Minerva (under disguise, and pretending to be an old friend of Ulysses) speaks highly in his praise, when he went to procure some poison for arrows; which were never used in those times against an enemy in battle.

Φάρμακον ἀνδροφθόρον διζήμενος, ὅφρ' οἱ εἴη
Τὸς χρεῖσθαι χαλκήρεας
Odyss. A. 261.

And the suitors of Penelope afterwards suppose, that Telemachus, with whom they live upon tolerable terms, is gone to a neighbouring island,

ὅφρ' ἐνθ' ἐν θυμὸς φάρμακον ἐνέλην,
Εν δ' ἐβόλην κατὰ τὴν, ἐν ἡμέας πάλιν ἀπὸ τῶν
Odyss. B. 19.

[e] Both Herodotus and Brissonius however inform us, that the kings of Persia never permitted a criminal to be punished for the first offence, which is expressly the same thing with our benefit of clergy.

Minerva likewise advises to destroy the suitors :

— *ὦ δότα, ἢ ἀμπαδόν* —

which is very extraordinary advice to be given by a deity ; especially as the whole crime in the suitors was the trespassing, perhaps, too long upon Telemachus's hospitality.

By the laws of the twelve tables, murder was a capital offence amongst the Romans ; but by the *Lex Porcia*, all capital punishments might be remitted for that of banishment, as appears by the famous speeches of *Cæsar* and *Cato* in Sallust. Horace classes an assassin only with an adulterer :

*Si mæchus foret, aut sicarius, aut aliqui
Famofus.*

And if we may credit the accounts of modern travellers, this most base and atrocious crime is still practised in Italy with a degree of impunity, and often in the face of the sun. Assassination is said, likewise, to be still not uncommon in Spain and Portugal ; and amongst the defences, which a person accused of murder may insist upon, the first mentioned is, that the person slain was *su enemigo conocido* [p].

It is well known that the wergild, or satisfaction to the relations of the person murdered, was thought sufficient atonement ; and there is in the laws of *Athelstan*, collected by *John de Brompton*, a general head thus entitled : “ *cujus ætatis, et pro quo pretio, aliquis sit occidendus.*” Thus likewise by the laws of *Ina*, “ *qui puerum genuerit et celaverit, non habet interfecti Weram, sed rex et dominus.*” It appears by 26 Hen. VIII. ch. vi. that compositions for murder were then paid in *Wales*, as it does also by *Krebs* (in his treatise *De ligno et lapide*), that they still continue to be paid in *Saxony* [q].

Tacitus

[p] *Fuer. Real de Esp.* 245. “ *Nullus qui suum occiderit inimicum, debet secum aliquid de iis quæ invenerit asportare, ne potius prædonis, quam inimici notam incurrere videatur.*” *Fueros de Arragon*, p. 166. This law seems even to honour the assassin, under the name of an enemy.

[q] It appears, however, by *Lindenbrogue* and *Baluzius*, that this custom (even anciently) did not prevail in all parts of Germany. *Petrus de la Marca* gives an account of a wergild of three cows, which hath been paid from the most remote antiquity by one parish in the Pyrenees, to a neighbouring parish on the first

Tacitus gives us the reason of this very singular custom's prevailing amongst the Germans, "*Luitur homicidium certo pecudum vel armentorum numero, recipitque satisfactionem univ[er]sa domus, utiliter in publicum, quia periculosiores sunt inimicitiae juxta libertatem.*" And indeed, all barbarians are particularly addicted to revenge.

Boulainvilliers, in his abridgement of the history of France, informs us, that if the criminal himself could not pay the *wergild*, his relations were liable; and in other places he says, "*Le Franc ne couroit jamais risque de sa vie, que dans les combats.*"

I have before mentioned, that the Mexicans punished murder by a *wergild*; it should seem likewise, that this custom is spread over most parts of Asia, though the Koran hath, in past, adopted the Mosaical law [1], Modern travellers, and lady Mary Wortley Montague in particular, mention, that little inquiry is made about a murder at this day in Turkey. "It is the business of the next relation to prosecute, and if they like better to compound the matter (as they generally do), there is no more said of it [2]." Gemelli likewise informs us, that in the Mogul's territories a *wergild* is due to the relations, but that it is reckoned dishonourable to claim it [3].

I should apologize for the length of these observations, and the many authorities I have cited, to shew that murder, by most laws, hath not been attended with its proper punishment of death (and which, indeed, is not a sufficient atonement for

first of June annually, as a satisfaction for the murder of three persons. *Marca Hispanica*, p. 68. But the most singular of these punishments, is by the laws of Canute: "If murder be committed in a church, the satisfaction shall be paid to Jesus Christ, the king, and the relation." Wilkins, Leg. Angl. Saxon. The Mexicans likewise punished by a *wergild*. Herrera.

[1] "O! true believers, the law of retaliation is ordained you for the slain; the free shall die for the free, the servant for the servant, and a woman for a woman: but he whom his brother shall forgive, may make satisfaction according to what is just. This is indulgence from your Lord, and mercy." Sale's Koran.

[2] Vol. iii. p. 39.

[3] Having said so much with regard to the *wergild*, or *wergild*, I shall here hazard an etymology of the word, though it does not agree with the Glossaries. The word *war* is rendered by *Bullet*, *doux*, *clement*, *benin*; and the word *gild* (amongst other significations) by a *tax* or *fine*: *wergild*, therefore, signifies the *mild* fine or punishment; and so it certainly is, for so horrid a crime as murder.

the

the crime) did it not tend to make every Englishman happy to be born in the present times, when a just horror is conceived of this most atrocious of offences, and that, whilst he enjoys the blessings of a free government, his life, and his continuing to enjoy them, is insured by every possible human precaution; and, what is perhaps still more valuable, he is secured even from the apprehension of receiving his death from the hands of his neighbour. Life is scarcely worth a thought whilst the mind can harbour such a suspicion.

This is the last statute of Henry the Seventh which I shall have occasion to make any observations upon. It is well known, that this king had an express panegyrist in the great Lord Bacon, who, however, is obliged to admit, that towards the latter end of his reign he was too much inclined to the left-hand, in order to reap forfeitures; and if this had not been admitted by his principal historian, the known punishments of *Empson* and *Dudley* [u] for their illegal extortions, in order to fill the king's coffers, have put this blemish in his character past all cavil or dispute. I have before observed, that the statute of *alienations* (as it is styled by lord Bolingbroke and others, and with such profusion of commendations) was by no means so extensive in its consequences as they have apprehended, nor could possibly have been, if they had read this statute with any degree of attention. Henry had however, the merit, either from reasons of policy, or perhaps more humane motives, to render the lower class of people more independant and free from the oppression of the rich and powerful, of which a statute of the 11th year of his reign, entitled, *A mean to help and speed poor persons in their suits*, and com-

[u] Henry the Seventh at first compounded for small penalties on penal prosecutions; but growing more avaricious, he appointed *Empson* and *Dudley* to be masters and surveyors of them. *Grafton*, p. 57. Sir Thomas More, in his collection of Epigrams, glances at this avarice in the predecessor of Henry the Eighth:

“Non jam divitias ullum est, magnum esse solebat;

“Quæsitæ nullo, crimen, habere dolo;”

and Lord Bacon, in the history of his reign, mentions the having seen an account of *Empson's* with regard to forfeitures, postilled with the king's own hand, vol. iii. p. 100. Restitution was made by the executors of this king of several of these penalties. *Grafton*, p. 57.

monly known by the name of the *Pauper* act [*w*], is a very sufficient proof. He therefore deserves the honourable title which James the First [*x*] says his grandfather had obtained, viz. *The poor man's king*; a title which deserves to last to the remotest ages, when his elegant and expensive monument in Westminster-abbey is not to be found in its place.

This protection of the lower classes of his subjects produced, as a natural consequence, a greater freedom and independency in the lower house of parliament [*y*] Sir Thomas Moore opposed a subsidy, with success, in the last year of this king's reign; which is, perhaps, the first instance of opposition to a measure of the crown, by a member of the house of commons.

[*w*] The modern practice under this statute, is to make the plaintiff swear he is not worth 5*l*. besides his wearing apparel. The statute however of Henry the Seventh speaks of *poor persons* indefinitely, nor am I aware from whence this practice hath been so settled, if it is not from the 2 Geo. II. ch. xxviii. sect. 8. which is confined however to the case of defendants prosecuted for offences against the customs. Notwithstanding the humanity of this act of Henry the Seventh, by 23 Hen. VIII. ch. xv. the pauper may be punished at the discretion of the judges, which accounts for what is sometimes heard of, though seldom practised, of a pauper plaintiff's being whipped. The Jewish law, on the contrary, forbids the countenancing a poor man in his cause, Exod. xxiii. 3. which is to be considered, however, as one of our statutes against maintenance. The acts which have introduced the necessity of stamps, in law proceedings, make the contest between the rich and poor still more unequal, than it was in the time of Henry the Seventh.

Οὐκ ἔστιν ἐδὲν κρείσσον, ἢ νομοὶ πόλεως
Καλῶς τιθέντες, ὃ, τε γὰρ ἀδυνάστεον,
Ὁ πλεσιός τε τὴν δίκην ἴσῃν ἔχει
Νικᾷ δ' ὁ μείων τὸν μέγαν, δίκαι' ἔχων.

Stobæus, p. 171. citing Euripides in Supplicibus. Parisiis, 1623, 4to.

[*x*] Βασιλικὸν δῶρον, ch. xii.

[*y*] Sir Thomas More, in the same epigram before cited, alludes to this encouragement of the lower class of people:

"Despectusque diu magnatum nobilis ordo,

"Obtinuit primo pristina jura die."

viz. on the accession of Henry the Eighth.

STATUTES

STATUTES MADE AT WESTMINSTER,

3 Hen. VIII. A. D. 1511.

THE 11th chapter of this statute opens with a very remarkable preamble in favour of the regular physicians and surgeons: "For as much as the science and cunning of physick and surgery is daily within this realm exercised by a great multitude of ignorant persons, of whom the greater part have no insight in the same, nor in any other kind of learning: some also *can* [z] no letters on the book, so far forth, that common artificers, as smiths, and weavers, and women, boldly and accustomedly, take upon them great cures, in which they partly use sorcery and witchcraft, partly apply such medicines to the disease as be very noious, and nothing meet, to the high displeasure of God, great infamy to the *faculty*, and the grievous damage and destruction of diverse of the king's people."

From this preamble it should seem, that physick was more liberally professed in England at this time, than perhaps in any other part of *Europe*; and I should conjecture, that this preamble was drawn by the famous *Linacér*, as we find by 14 Hen. VIII. ch. xv. that his name is the second mentioned in the first charter to the college of physicians, after *Ferdinandus de Viçtoria* [a].

Lord Chief Justice Hale says, that this statute is a good caution to empiricks, who are certainly subject to the penalties, if they transgress it; but combats much an opinion, which it seems prevailed in his time, that if a patient of such an empirick died through his ignorance, he might be indicted for murder [b].

[z] This should be *con*.

[a] It appears by many letters of the kings of England to the popes, that their physicians were formerly ecclesiasticks, on whom the pope is intreated to bestow preferment. Rymer.

[b] Vol. i. p. 240.

There

There are among the laws of Bearn (in Du Moulin's Collection of the Customs of the different provinces of France) some seemingly wise regulations with regard to the improvement of medicine, and which are at least of equal antiquity with the present law : and by the laws of *Provence*, the acting as both physician and apothecary is forbidden, under no less penalty than banishment. "*Los medecin no deben haber part en los drogus deus Ipotecaires, sans pena de perdre talas drogus, et estar forabanditz deu Pais [c].*"

By an ancient law of the *Wisigoths* (whilst in Spain [d]) a physician is not permitted to prescribe to a criminal, but in presence of the gaoler; the reason of which very singular law I take to be, that it was apprehended he would supply him with drugs to destroy himself, and so avoid the publick execution due to his guilt; and by a law in the *Fuero Real de Espana*, no physician, or surgeon, is to bleed a man's wife, but in the presence of her husband, which, without citing the *Fuero Real*, sufficiently appears to be a *Spanish* regulation.

Not only physicians are intended by this law to be put upon the liberal footing, which that most learned and useful profession merits from their patients and the publick; but surgeons also, who receive a further encouragement and protection from a statute of the fifth of Henry the Eighth, which exempts them from an attendance upon juries [e]. A ridicule has

[c] Du Moulin, vol. ii. p. 1143.

[d] Euer. Jusg. l. xi. p. 433.

[e] It may, perhaps, be thought singular to suppose, that this exemption from serving on juries, is the foundation of the vulgar error, that a surgeon, or butcher (from the barbarity of their business) may be challenged as jurors. It is difficult to account for many of the prevailing vulgar errors with regard to what is supposed to be law. Such are, that the body of a debtor may be taken in execution after his death; which, however, was practised in Prussia before this present king abolished it by the *Code Frederique*. Other vulgar errors are, that the old statutes have prohibited the planting of vineyards, or the use of sawing mills; which last error I should conceive to have been occasioned by 5 and 6 Edw. VI. ch. xxii. which forbids the use of what are called *gig-mills*, and are supposed to be prejudicial to the woollen manufacture. There is likewise an act of 23 Eliz. ch. v. which prohibits any *iron mills* within two and twenty miles of London, to prevent the increasing dearthness of wood for fuel. As for sawing-mills, I cannot find any statute which relates to them, and they are established in Scotland to the very great advantage both of the proprietors and the country. It is supposed likewise to be penal to open a coal mine, or to kill a crow, within five miles of London; that it is penal to shoot with a wind gun, or to carry a dark lanthorn. The first of these I take

has been thrown upon surgeons, from their having been incorporated, formerly with barbers, from which union they have but within these few years separated themselves. The ridicule, however, arises from the change in the barbers situation, and not that of the surgeon [f]: before the invention of perukes, barbers were not employed often in the low office of shaving [g], and as for the making of perukes, it is a branch of trade which hath no sort of connection with chirurgery.

to arise from a statute of Henry the Seventh, prohibiting the use of a cross bow; and the other from *Guy Fawkes's dark lantern* in the powder plot.

[f] It appears by Joinville's *Life of St. Lewis*, that barbers in other countries were anciently the surgeons who attended armies during a campaign. Speaking of the sickness in the christian army in Egypt, he says, "les barbiers oterent la char morte," p. 65.

[g] It should seem from ancient portraits, that the beard was suffered either to grow to its full length, or else to have been clipped in part only.

STATUTES

STATUTES MADE AT LONDON [b].

21 Hen. VIII. A. D. 1529.

THE title of the 7th chapter of this statute is as follows.
 “*Servants embezzelling their masters goods, to the value of forty shillings, shall be punished as felons [i];*” and the preamble sets forth, that it was *doubtful at common law* whether such embezzelling was felony, or not. This seems to me to be one of those doubts recited by the preambles of statutes; which have much enervated the principles of the common law, and the bad consequences of which I have already observed upon. It is agreed by all the writers on the crown law, that if a butler steals his master’s plate, or a shepherd steals his master’s sheep, it is felony; and the reason why this should be considered as a felony is clear, viz. his having no sort of property in the thing stolen, and therefore he is likewise within the general rule of all larcenies including trespass, and the word *cepi* inserted in indictments for this offence, is fully satisfied.

What, therefore, the writers upon the crown law say with regard to a carrier’s stealing goods, who is carrying them from one place to another, seems to me (I speak with great deference to such authorities and opinions) not to be consistent with the principles which are above laid down: as the carrier hath no better property in such goods, than the butler hath in his master’s plate, or the shepherd in his master’s sheep. The case which is generally cited in support of this doctrine, is the thirteenth of Edward the Fourth [k], which, though it is the foundation of what is conceived to be law with regard to

[b] This parliament was afterwards adjourned to Westminster.

[i] By 27 Hen. VIII. ch. xvii. the benefit of clergy is taken away from such offenders. This statute is published at length by Rastall, and the title of it is, “An act concerning such as be put in trust by their masters, and afterwards do rob them.”

[k] Term. Patch. pl. 5.

this point, seems to have been misunderstood. The case is a long one, and I shall state from it the material parts before the court, together with the final decision. “It was debated in the Star-chamber before the council, whether a person having bargained with another to carry certain bales of goods to *Southampton*, who took and carried them to another place, and broke open the bales, and converted them to his own use, was guilty of felony, or not? A variety of opinions upon this arise, and it is agreed, that the point should be argued before the judges in the Exchequer-chamber. Upon the same point (then again argued) the judges differ in opinion, though it should seem, from the short notes of what they said, that the majority at first thought it was *not* felony; from which it hath been conceived, that the point was so determined.” It appears, however, by the conclusion of the case, that the judges certified their opinion to the chancellor, *that it was felony*.

It is plain, therefore, that this leading and fundamental case hath been misunderstood, and the occasion of it I take to be this. Those judges, who appeared by the report to have been of opinion, that the criminal, in this case, was not guilty of felony, say, he who steals goods (*qui lui font bailes*) is not guilty of larceny; which position may be allowed, if the word (*baile*) is understood in its proper sense, which is that of lending upon pledges, or securities; and the bailee, or pawnee, in such a case, having a special property in the goods, cannot be indicted for stealing them: besides, that the pawner knows against whom he is to bring his civil action, if the goods are detained beyond the justifiable time. *Staunford*, in his pleas of the crown, puts many cases on this head, all of which relate to *bailment upon pledges*; and I am therefore confident, that all those cases, which have been determined upon mature consideration, will, if properly attended to, relate to *supposed larcenies*, whether the bailee hath a special property in the goods stolen. I submit this, however, with great deference; and it is a point of infinite consequence to the public, as what are called *breaches of trust* do but too much increase, with the greater temptation, which daily arises from the increase of property and trade in this country, and which

which necessarily require a confidence in men who have had but mean and illiberal educations, and often from thence an illiberal disposition.

Whether I may be thought to have too presumptuously differed from the opinion of the writers on the crown law, in certain parts of what I have here ventured to advance, or not, I should think that the doubt, which is recited in the preamble of this statute, could never have been the doubt of a lawyer; for in what respect does a servant running away with a casket of jewels [1], which I have not lent to him upon pledges, or as a security) to be distinguished from the case of a butler, who steals his master's plate, and which the writers upon the crown law (and particularly Hawkins [m]) allow to be felony? It is admitted, however, that greater accuracy cannot be expected in a work of such an extent, than is generally to be found in his very valuable treatise on the pleas of the crown.

This chapter of the statute is followed by another, which orders restitution of the goods stolen, when the prosecution is by indictment, and not by appeal, which hath in effect taken away the *appeal for larceny*, which was anciently so frequent. I should suppose, that both one and the other were laws made (as Lord Bacon terms it) *on the spur of the occasion*; and that a servant had, at this time, run away with a casket of jewels, and which happened to be of considerable value.

The civil law not only makes a *breach of trust* (as it is called) amount to a larceny, but declares, "Si creditor pignore, five is apud quem res est deposita, ea re utatur, five is qui rem utendam accepit, in alium usum eam transferat, quam cujus gratia ei data est, furtum commississe videtur." And in the latter end of the session of parliament, for the year 1765, a bill was proposed in the house of commons, to declare breaches of trust, accompanied with certain circumstances, to be felony. By the *Swedish law*, if any thing is found, without proper notice, or advertisement, to those

[1] Staunford, in his treatise on the Pleas of the Crown, p. 25. states the following case from the Year Books: "Si jeo baile un bagge d'argent a mon ser-
vant a garder, et il fuait et allaist de moy ove le bagge, est felonye."

[m] Vol. i. p. 89.

who may be the owners, and the finder converts it to his own use, "*in crimen furti incidit.*" *Quin et domesticorum furta, gravius quam simplicia constitutionibus puniuntur* [a]."

[v] *Thetis Romano-Suecica. Gryphwaldia, 1719.*

STATUTES

STATUTES MADE AT WESTMINSTER,

23 Hen. VIII. A. D. 1531.

THE 3d chapter of this statute may be looked upon as the first general law which takes away the benefit of clergy, as the twelfth of Henry the Seventh had only taken this privilege from those who were convicted of petit treason, or by the most extensive construction, *murder* [o]. The criminals, who are to suffer capitally by this law, are those convicted of murder, sacrilege, arson, robbery on the highways, or in dwelling houses, the owner, his wife or children, or servants *being within, and put in fear*. From these two kinds of larceny, enumerated by the statute, it is very clear, that the legislature meant to punish capitally only those larcenies or robberies, which were attended not only with the loss of the persons money or goods, but which were likewise accompanied with circumstances of aggravation and violence. As our statute law at present hath taken the benefit of clergy from many other kinds of larceny, and hath been by many thought to have extended the severity of capital punishments for this offence too far, it may not be improper to take a summary view of the different acts of parliament, which will be found to arise from the many and great improvements by trade and commerce, from century to century.

Before the reign of Edward the Third, it seems to be generally agreed we had no gold coin in England [p], and the silver

[o] See the observations on that statute. The present law punishes *real clerks* by their being delivered to the ordinary, who is not to allow of what is called *purgation*, but imprison them for life; which is believed to be the only instance of punishing by imprisonment for life, either by the common or statute law.

[p] Since the former edition it hath been suggested to me by a person of great erudition, that there is proof of gold being coined as *money* so early as the reign of Henry the Third. These proofs are to be found in some additions, by the society of Antiquaries, to Mr. Folkes's tables of the gold and silver coins of England, where a manuscript of the thirteenth century, in the Chamberlain's office at Guild-hall, London, is cited, *de antiquis legibus*: "Hoc anno (sc. 1257) creavit Rex monetam auream denar' ponder' duor' sterlingor' de auro purissimo, et

silver likewise is believed not to have been in great profusion: rents were paid almost entirely in kind; and as there was little, or no trade, the money was chiefly in the coffers of the great barons, *centum servata clavibus*, which no one could steal, or carry away. As for plate (the great object of temptation to a thief) there was still less to be found, as it appears by the wills of some of the ancient kings of England, that they disposed of (as particular legacies) pieces of plate, which a gentleman of a common fortune at present would not think worth a legatee's acceptance. With regard to other kinds of furniture, it was clumsy and heavy, consequently less worth stealing, or if stolen could not be carried off; and as for linen, which is the most easily disposed of by the pilferer, it is believed that none was worn at this time, as the mountaineers in Wales (who may be supposed to live at present as the English did centuries ago) still use nothing but flannel.

Trade, however, by this year of the reign of Henry the Eighth, had considerably increased, and with trade, its natural concomitants, luxury and elegance. The house had now something to tempt the pilferer; and if it was, by its situation, lonely, and at a distance from other habitations, gangs of thieves beset and rifled it [q], which seems to have been the occasion of the statutes requiring, that the owner or his family should *be put in fear*.

"voluit ut ille aureus curreret precio viginti silingor;" to which citation is added, "the gold coin therein mentioned must have been received as money at the time of its coinage." From a manuscript communicated to the society by the learned Dr. Ducarel, and which manuscript contains an additional proof of gold being coined in the reign of Henry the Third, by an extract from a record in the Tower. I am likewise informed, that there is now a learned treatise in the press, containing Observations on the Saxon Weights and Money, which confirms what hath been above advanced.

[q] The first statute against *Egyptians* passed the year before, which recites them to go from place to place in great companies. It appears by Holinshed's Chronicle, that they had invented a language peculiar to themselves, called *Pedlars French*, and that they were subdivided into fifty-two different classes of thieves; the names of which he enumerates, vol. i. p. 183. This very peculiar race of people are banished from almost every part of Europe; they are in French called *Bohemians*; their complexions seem to prove, however, that they come originally from Egypt, or some southern latitude: Cervantes says of them, "that they seem to have been born for no other purpose, than that of pilfering." Robberies had at this time increased so much in France, that Francis the First (contemporary with Henry the Eighth) issued an ordinance for punishing this crime by breaking on the wheel. It appears by this ordinance, that the punishment for this offence was, before, the same, in the two countries.

The

The next statute, which takes away the benefit of clergy from larceny, is 5 and 6 Edw. VI. ch. ix. which extends the statute of Henry the Eighth, to a robbery in a house, where the owner, or any of his family, happen to be, although they are *not put in fear*; which was, in all probability, occasioned by a house having been rifled, whilst the owner and his family were asleep, and consequently *not put in fear*, though it is a necessary circumstance by the statute of Henry the Eighth. The legislature, by the same act (having thus explained the the twenty-third year of Henry the Eighth) take away likewise the benefit of clergy from a robbery in a booth, or tent in a fair. This protection to the property of a person, who kept a shop or booth in a fair, arose from fairs being much more considerable than they are at present, and possibly not unlike the great fairs of Germany, in which very considerable mercantile transactions are carried on; whereas with us at present, the well-supplied shops in every town and village almost (as well as licensed hawkers) do not make it necessary for the inhabitants of the country to wait for a particular anniversary, to supply the wants of the whole year.

The next statute, which relates to robberies in dwelling-houses [r], is the 39 Eliz. ch. xv. which recites, that the poorer sort of people were obliged to leave their houses during divine service, without any one in them; as likewise when they were employed in country labours, or business: it there-

[r] It was allowed by the *twelve tables* to kill a Burglar, QVEI. NOX. FORTOM. FAXSIT. SEI. IM. ALIQVIPS. OCCISIT. IOVRE. CAESOS. ESTOD. SEI. LOVCI. FORTOM. FAXIT. TELOQ. SE. PRAEHENDIER. PROHIBESIT. SEI. IM. ALIQVIPS. OCCISIT. IOVRE. CAESOS. ESTOD. AST. SEI. LOVCI. FORTOM. FAXSIT. NEQVE. TELO. SE. PRAEHENDIER. PROHIBESIT. SEI. LEBER. SIET. PRAETOR. IM. VERBERARIER. IOVBETQD. EIQUE. QVOI. FORTOM. FAXSIT. ADDECITO. SEI. SERVOS. SIET. VIRGEIS. CAESOS. EX. SAXO. DEICITOR. SEI. IMPORES. SIET. PRAETORIS. ARBITRATVV. VERBERATOS. NOXSAM. SARCITO. This law is remarkable not only for the matter, but for the language and orthography of it. It seems from this spelling, that the Romans generally pronounced their *u* as the Grecians did their *υ*, and as the French now pronounce those vowels when joined together: at least this observation holds true in those syllables of words, which are not final, as in *jour*, instead of *jure*; and the Roman name of Lucullus, which is in Greek ΛΟΥΛΛΟΣ. In the ends of words, *o* is used instead of the more modern spelling with *u*, as in *cafos*, instead of *cafus*, which again agrees with the Greek termination of ΑΚΑΛΟΣ, instead of ΑΚΑΛΟΥ. It may be further observed, that the Romans pronounced the letter *i* like an *e*, and as most of the nations in Europe pronounce it, as *leber* is used instead of *liber*.

fore enacts, that if any person shall steal goods from any dwelling-house (*though no one is within*) which exceed the value of five shillings, he shall be excluded from the benefit of clergy.

By this time tenants had procured from their landlords leases for terms of years; and having a more permanent interest in their farms, they could afford to improve them, and reaped the honest fruits of their industry. As their rents were now paid in money, they must at times have had considerable sums in their houses, and perhaps a silver spoon, or linen, to tempt the thief, who watched the opportunity of every one being absent, and by that means not only plundered the house with ease, but evaded the two former statutes, both of which required the owner, or some of his family, *to be in the house, at the time the robbery was committed.*

The legislature having thus protected the property of the farmer, in the third year of William and Mary [1] (when trade had infinitely increased) shew the same protection to the property of another most useful class of men to society, viz. the merchants, and enact, that “if any one shall steal goods “ from any shop or warehouse adjoining to a dwelling-house, “ to the value of five shillings, he shall not be entitled to his “ clergy, *although no person shall happen to be within.*” And the tenth and eleventh of William the Third (commonly called *the shoplifting act*) takes away clergy from him, who shall privately steal goods to the value of five shillings, from any *shop, or ware-house, coach-house, or stable.* This last statute, besides including *coach-houses and stables,* does not make it necessary, that the shop or ware-house *shall be adjoining to the dwelling-house,* which is required by the 3d of William and Mary; and I the rather take notice of this distinction between the two laws, as Mr. Justice Foster hath reported [2] a decision at the Old Bailey in July 1751, that *this statute does not extend to any warehouse, which is a mere repository for goods, but only where merchants and traders deal with, and sell to, their customers.* (It should seem, however, that these *distant ware-houses* were those expressly, which were intended to be protect-

[1] Ch. ix.

[2] P. 72.

ed by this statute, as the shop or warehouse *adjoining to a dwellinghouse* was before protected by 3 Will. III. ch. ix. and the more distant the warehouse, the more probable it is that it should be broken open.

Lastly, the 12 Ann. ch. i. takes the benefit of clergy from him, who shall steal goods to the value of forty shillings from any *out-house*.

I have endeavoured, by this state of the different statutes, which relate to the robbing of the dwelling-house [*u*], or building in some measure connected with it [*w*], to shew the one naturally to follow and arise out of the other, from the alterations of circumstances from time to time, and chiefly from increase of trade; as also to justify the statutes from being considered as too severe. What hath besides contributed perhaps to the opinion, which many have formed, that our laws, with relation to the punishment of this offence, are too bloody, is, perhaps, the comparison of the English statutes with those of other countries; but till a country can be found, which contains equal property and riches, the comparison cannot be a just one [*x*]. I allow that, by the laws of most countries, this offence is not a capital one [*y*]; and Plato observes, from a passage in the *Odyssey*, that, in the time of Homer, it was not considered as a blemish, but rather honour to a man's character.

[*u*] As for other larcenies, it is well known, that they are seldom punished with death.

[*w*] A statute of the late king hath indeed gone much further, by making it felony to steal black lead from the mine.

[*x*] I have not an opportunity of being informed accurately what kind of thefts are punished capitally in Holland.

[*y*] Instances, however, are not wanting of its being so. Thus Hector Boethius informs us, that, by the laws of Kenneth, thieves were to be punished with death; and by the laws of Athelstan, a freeman was to be thrown from a cliff, and a slave to be stoned. It should seem likewise, that theft was punished by death by the old Welsh laws, as a particular cliff is shewn in Merionethshire, between Dolgelly and Tal-lyn, from whence the criminal (agreeable to the laws of Athelstan) used to be precipitated: there is likewise a traditional story, that a criminal desiring the sheriff to shake hands with him before he died, involved him likewise in his fate and punishment.

Fuller (in his *Worthies*) gives an account of an ordinance of Edward the First, with regard to the stealing lead or silver ore from the Derbyshire mines. For the third offence, a knife was to be stuck through the hand of the criminal fixed on a table, in which agony and attitude he was to continue, till he had freed himself by cutting off his hand.

With

With regard to the Spartans, it is well known that Lycurgus is said to have promoted it by his laws. If this really was one of his institutions, it serves only to prove the general rule, as he was in all instances a most paradoxical legislator. I should, however, suppose that we have a very imperfect and inaccurate account of the Spartan customs and manners [x], as their institutions were of a most forbidding nature to a stranger, who would not therefore live with them; and the Spartans themselves were, by their laws and education, obliged to be illiterate; we therefore cannot be informed by a Spartan writer. I should therefore suppose that this encouragement of theft hath been misunderstood, from an encouragement given by their legislator, to make incursions and depredations [a] upon the neighbouring states, which tended to keep up their perpetual wars, and martial disposition: as for a theft at home between Spartan and Spartan, Lycurgus had taken care that there should be nothing to steal.

The Romans punished this offence in their slaves often with death: the senatorial order, however, were even exempted from any prosecution for this crime, according to Dio Cassius.

Ἦτο δ' τὰς αὐτὰς ἡμέρας δόγμα ἐγένετο, μηδένα τῶν ἐς τὴν γερουσίαν τελευτῶν ἐπὶ λυσία κρείνεν, ἢ ἕτως οἱ τε τότε ἐν τοιαύτῃ τινὶ αἰτίᾳ ὄντες ἀφελθῶσαν [b].

[x] Xenophon indeed hath written an express treatise, which is entitled *Λακεδαιμονίων πολιτεία*; but the distance of time between him and Lycurgus must have made the traditions and account of the Spartan laws very little to be depended upon, as Lycurgus is said by Plutarch to have lived in the first Olympiad, and Xenophon is supposed to have flourished in the 94th. Another reason that invalidates the testimony of Xenophon likewise is, that his treatise upon the Lacedæmonian laws and customs is followed by another on those of the Athenians, which (with the pique of a banished citizen) he endeavours to represent as inferior. Allowing however what he says with regard to the permission of larceny by Lycurgus, he confines it to theft of victuals, and that by an hungry man: ὥς δ' ἐμὴ ὑπὸ λιμῆ ἀγαναδὺν ποιέουσιν, ἀπραγμόνως μὲν αὐτοῖς ἐκ ἑδωκῆ λαμβάνειν ὧν αὐτὸν δέωσιν, κλέπτειν δ' ἐφ' ἧκεν ἔστιν αὐτῷ λιμῷ ἐπιχερῆντας. Ed. Henr. Steph. p. 394. Plutarch likewise (who by living so much later than Xenophon is still less to be relied upon) agrees in confining this permission to the theft of victuals, κλέπτειν δ' ἐμὴ τῶν σιτίων ὅ, τι αὐτὸν δύνωσιν, μαθητοῖς εὐνῶς ἐπιτρέψαι τοῖς καθ' ἑαυτοὺς, ἢ βαθυμῶς φυλάττειν. Francofurti, 1620, vol. i. p. 50.

[a] I have before observed, on the fourth of Henry the Fourth, that the civilized Athenians were required, by one of their laws, to make depredations twice a year upon the people of Megara.

[b] Dio Cass. l. xlix. p. 477. edit. Hen. Steph. I have before observed, p. 301. that Lord Clarendon says, that the house of lords, in the time of Charles the Second, insisted upon their privileges being saved in a bill to punish wood-stealers.

None

None of these instances however prove, that thefts, attended with aggravating circumstances, might not have been punished with severe or capital punishments; though (as with us) what goes by the general name of larceny, might have been treated with greater indulgence to human temptation and infirmities, or even perhaps somewhat encouraged by a whimsical and paradoxical legislator.

STATUTES

STATUTES MADE AT WESTMINSTER,

27 Hen. VIII. A. D. 1535.

THE 4th chapter of this statute regulates the trial of piracy, or other capital offences committed on the high seas, which the preamble recites to have frequently been committed with impunity, because the trial before the admiral, or his commissary, was according to the rules of the civil law, which requires either confession of the criminal, or *proof by indifferent witnesses*. The statute after this recital directs, that such offences shall for the future be tried by the king's commission, in any county, in like form and manner, as if the crime had been committed on shore.

I should conceive that this statute was drawn by the then judge of the admiralty, as it contains a most strong and undeserved reflection on the common law, by the reciting "*that indifferent witnesses were not required at the trial by common law, as they are by the civil law.*" It is true, that more exceptions to the testimony of witnesses are allowed by the civil law, than by the law of England [c]; but they are only exceptions

[c] By the old French law, the objections to the competency of witnesses are still more numerous than by the Roman law. Thus Beaumanoir, in his *Coutumes de Beauvoisis*, "*Batars et serfs doivent estre deboute de leur tesmoignage, se le querele n'est contre serf ou contre batar; mesiau ne doit pas estre oi en tesmoignage, car coutume s'accorde que ils soient deboute de la conversation des autres gens; chaux qui sont a men pain, et a men pot, ou en me mainburnie, ne doivent pas estre oi en tesmoignage pour moi.*" As both the language and orthography of the above citation are very ancient, I shall translate some of the more unusual terms. *Mesiau* signifies a leper; it is sometimes in this author written *mesie* et *mezle*, which agrees with our sense of the word *measly*, when applied to swines flesh: such a difference in the spelling of a word will not surprize any one, who hath happened to read many old authors, in any of the modern languages. *Chaux qui sont a men pain, et a men pot, ou en mainburnie*, signifies *those who eat my bread, or partake of my pot, or are under my guardianship, or government.*

This treatise of Beaumanoir is so systematical and complete, and throws so much light upon our ancient common law, that it cannot be too much recommended to the perusal of the English antiquary, historian, or lawyer. He kept the courts of the Comte de Clermont, and gives an account of the customary laws of Beauvoisis (which is a district of county about forty miles to the northward of Paris) as they prevailed in the year 1283. He is consequently a more ancient writer than Littleton, and, to speak with all due deference to this father of

exceptions of unnecessary subtlety and refinement: the law of England does not permit a criminal to be convicted, but upon the most full and satisfactory evidence; and such evidence cannot be expected from what this preamble, by implication, *fills witnesses swearing under improper bias*.

There is a parenthesis [a] of some ambiguity likewise thrown into this preamble, which relates to the confession of the criminal, required by the civil law (*to which they will never do without torture or pains*). I shall not dwell, however, upon the true meaning or construction of the preamble, but shall only observe, that the practice of torturing criminals is not spoken of with any great abhorrence by the legislature; nay, seems to be recited as allowed to have been practised in this country, in all offences tried before the admiral. I have, in my observations on the statute of Westminster the first, endeavoured to prove, that torture (though not frequently used) was not absolutely unknown in England, since which some additional proofs have occurred. Oldmixon in his history [b] asserts, that torture was used, in 1558, against one Simpson, to extort a confession [c]; and Sir Walter Raleigh at his trial mentions, that *Kemp* was threatened with the rack, and that the keeper of this horrid instrument was sent for, which seems to prove, beyond all doubt, that torture had been occa-

our law, perhaps a better writer. It need hardly be said, that the customs and laws of the two countries were at this time very similar, especially of the more northern parts of France; if it wanted other proof, the commentators upon the oldest French law books cite Littleton as illustrating their customs.

Mr. Hovard, also, a learned advocate of the parliament of Dieppe in Normandy (hath in the present year 1766) translated Littleton into modern French, to which he hath subjoined an account of Glanvil, Fleta, and some other of the most ancient writers on our law. Beaumanoir's work was first printed at Bourges in 1660, with a short commentary by Gilles Thaumasiere de la Thaumasiere, who at the same time published les usages de Jerusalem, which contains a most complete Code of laws for the government of the Christians, whilst in possession of that part of Asia, and may, therefore, be supposed to participate of the laws of most parts of Europe.

[a] This parenthesis (or at least words included between crochets) is not probably in the roll of parliament, and must therefore be considered as that of the editor's of the statutes.

[b] P. 284.

[c] We find by Cornificius's Rhetorica (sometimes published together with the works of Cicero) that it was an usual topick of dispute, what kind of credit was to be given to evidence thus procured, "*A quaestione dicimus, cum demonstramus majores nostros veri inveniendi causa tormentis et cruciatibus quaeri voluisse, et summo dolare cogi, ut, quicquid sciant, dicant*;" the same appears, likewise, by the 5th book of Quintilian,

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sionally used, otherwise there would not have been a regular officer who had the custody of it. If my memory does not fail me, the yeomen of the guard shew, at the Tower, some of these diabolical instruments at this day [g].

Torture still continues to be used in most countries of Europe, and amongst the rest in France; though honest Montaigne hath written with great warmth and freedom against it [h]. Montesquieu hath likewise a short chapter, by which he would mean to condemn it; but it is the most fantastical and whimsical in his whole work of the *Esprit des loix*: the very great ability and learning, which appear almost in every other part of it, entitle him, however, to these, and greater liberties, with his readers.

The present king of Prussia hath, to his honour, abolished it in his own dominions. “La question se donne en Allemagne aux malfaiteurs après quils sont convaincus, afin d’arracher de leur propre bouche l’aveu de leurs crimes: elle se donne en France pour averer le fait, ou pour decouvrir les complices: Il y a huit ans que la question est abolie en Prusse [i].”

The 6th chapter of this statute was intended to promote the breed of good and strong horses, to which there was a very particular attention paid at present, as appears by several laws of this reign, with the same title: the means of securing strength in the future breed of horses, is by directing, that no stallion shall cover a mare which is not at least fourteen hands

[g] Lord Coke, in his 3d Inst. p. 35. mentions that the rack or brake, in the Tower, was brought into England by the duke of Exeter, in the reign of Henry the Sixth, and condemns the use of it. *Campion*, a jesuit, was put to the rack in the reign of Q. Elizabeth, *Cambd. Eliz. p. 476.* and in Collier’s Ecclesiastical History other instances during the same reign are mentioned, and particularly *Francis Throgmorton*, who was eldest son of *John Throgmorton*, justice of Chester, vol. ii. p. 591. Bishop Burnet likewise, in his history of the Reformation, mentions that *Anne Askeu* was tortured at the Tower in the year 1546, and that the lord chancellor, throwing off his gown, drew the rack so severely, that he almost tore her body asunder, vol. i. p. 342. It hath likewise been suggested to me (since the former edition) by an authority which I should be proud to mention, that it appears by the Cecil papers (published by Murden) that all the duke of Norfolk’s servants were tortured by order of Q. Elizabeth, and that the same queen threatened Hayward the historian with the rack.

[h] Liv. ii. ch. 5.

[i] Memb. Brandeb. p. 394.

high [k]. *Carew* (in his account of *Cornwall*) supposes, that this law hath been the occasion of losing a smaller and more useful horse, which was almost peculiar to that county; and whether from the same cause I will not pretend to say, but it is certain, that the small breed of horses is now almost entirely lost in *Wales*. It may, perhaps, appear to be a whimsical conjecture; but I should suppose, that the occasion of desiring a stronger breed of horses than the country naturally produced, arose from tournaments, as well as other very expensive and magnificent pageanties of the early parts of this reign, which all historians agree were excessive [1]. Besides this, we find by 14 and 15 Hen. VIII. ch. iv. that a great number of Englishmen went into foreign services; and as armour was still used, no horse was proper for such an officer except a horse of strength, and, even after his return, he continued to want the same breed for a tilt or tournament.

The 10th chapter relates to uses and wills, and there is a proclamation published, in consequence of it, by *Berthelet*, in the same year.

Much hath been said with regard to the convenience and inconvenience arising from uses and trusts. *York*, one of the judges at the time this act passed, says, "it is absurd that I should enfeoff another with my land, and yet claim it

[1] By 33 Hen. VIII. ch. v. (which statute is printed at length by *Rastall*) the same anxiety in the legislature for promoting the breed of large horses appears, and some of the regulations are rather singular. Every archbishop and duke are obliged under penalties to keep seven stoned trotting horses for the saddle, each of which is to be fourteen hands high at the age of three years. There are afterwards very minute directions with regard to the number of the same kind of horses, which are to be kept by other ranks and degrees; and the last mentioned is that of a spiritual person having benefices to the amount of 100*l.* per ann. or a layman, whose wife shall wear any French hood or bonnet of velvet, who are obliged (under the penalty of 20*l.*) to keep one such trotting stone horse for the saddle. This statute continued unrepealed till the twenty-first of James the First, which is the most comprehensive act of repeal in the Statute-book. It was indeed previously repealed by 8 Eliz. ch. viii. as to the Isle of Ely, Cambridgeshire, and many other counties, which the preamble recites, "on account of their rottenness, unfirmness, moisture, and waterishness, were not able to breed or bear horses of such a size."

[2] Sir Thomas More, in the collection of his Poems, which go under the name of *Epigrams*, pays his court to the new king, by commending both the magnificence of his tournaments, and the good regulations which he had introduced with regard to the making this extraordinary amusement more safe than it had been.

“ against

"against my own gift [m]." And in the same case likewise (which is a long one) the great point is agitated, whether a *use* and a *trust* is the same [n], and whether there were either *uses* or *trusts* by the ancient common law.

The first case in which the court of Chancery determined upon a feoffment to an *use*, seems to have been in the 18th of Edward the Fourth [o]. A married woman made her will, and enfeoffed feoffees to the *use* of her husband and herself in fee; the husband sued a subpoena against the feoffees, in order to take the opinion of the court, whether this will was good or not; and it was considered as a case of some importance, as common law judges assisted the chancellor. One of these assistants seemed to think it good in chancery, being a *court of conscience*; the other judges, in concurrence with the chancellor, agreed, that, as the will was void at common law, it was void, likewise, in that court.

The next case is in Easter term the twenty-First of Edward the Fourth, when it was attempted to make the feoffment of an infant, under the age of fifteen, good, after the execution of which he made a secret trust to the feoffees by parol. This was likewise determined to be void; and, in the fifteenth of Henry the Seventh, it is agreed by the judges, that the *cestui que use* hath no right whatsoever to the land, but by permission of the feoffees.

These cases are not, indeed, such as will be probably looked after by a modern practiser in a court of equity: they shew, however, that these *fidei commissa*, and ingenious inventions, were at first much discountenanced. The preamble to the statute likewise inveighs much against the ill consequences arising from them, and, therefore, as lawyers somewhat technically express it, *executes the use to the possession*; or, to speak more intelligibly to a common apprehension, *unites*

[m] Year Books Term. Pasch. 27 Hen. VIII.

[n] Roper, in his life of Sir Thomas More, mentions the reasons, why the judges would not consider a trust to be the same thing with an *use*; p. 25, & seq.

[o] Year Book. Lord Hardwicke (in Davenport and Oldys, July 17, 1738) speaks thus of this statute, "and by this means a statute made upon great consideration, introduced in a solemn, pompous manner, hath had no other effect, than to add at most three words to a conveyance." Atkins's Rep. p. 591.

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them [p]. It would have been still more commendable, perhaps, to have, in many instances, abolished them; for why is any one, either in the possession or transferring of his property, most unnecessarily to make use of the intervention and name of another? at least, in the greater part of worldly transactions, this is by no means requisite. As Lord Bacon hath an elaborate reading on this statute, and which seems to be much the most accurate and complete of all his treatises on the law; I shall not obtrude any of my own crude observations, but refer the reader to this more satisfactory authority.

The latter part of this statute relates to wills; and as every one for the two last centuries has had the power of devising his land, it may perhaps be thought extraordinary, that this power should not have been derived from the common law [q], but from an act of parliament. The reason of this I take to arise from so few being capable formerly of writing a will, or having an opportunity to procure a person who could write what they dictated. If it is said, that by the common law every one had a right thus to dispose of his personal property; the answer is, that personal estate was anciently one of those *minima, de quibus lex non curat*. Besides this, land could not be transferred without the consent of the king, or the superior lord; and a fine was paid for the obtaining his consent to such alienation. The will, moreover, could not be opened, or known, till after the testator's death; and possibly the devisee was the mortal enemy of the feudal lord, who could not permit such a tenant to be imposed upon him. These, or other reasons, must have occasioned this power's not being given to the owner of land by the common law; as by most other laws [r] the subject hath this indulgence, which

[p] It is one of the instructions to the earl of Suffex, lord-deputy of Ireland, that he should introduce a statute of uses. Cox's history of Ireland, p. 315. The reason of which probably was, that the forfeitures to the king might not be evaded.

[q] There are instances in Rymer of the kings of England empowering particular persons to make their wills: Edward the Third gives such a power to his son the Black prince.

[r] By the laws of the twelve tables, *uti quisque legasset, ita jus esto*. There are many regulations with regard to wills in the Koran; and Herrera mentions, that the native Mexicans had this power; so that it may be said to prevail as law in three parts of the globe. It is difficult to know, in the ancient laws collected by

which seems to be a great spur to industry, as well as a security of the dutiful behaviour of the family and relations, to him who is invested with such a power.

As wills are often construed contrary to a fundamental rule, viz. that they are to be expounded agreeably to the intention, the testator might as well have continued to have had no such power. The reason generally given for these decisions is, that precedents of other adjudged cases must be followed, as otherwise the law will be uncertain, and advocates will not know how to advise their clients. The answer to this seems to be, that there cannot be a case in point, without the two wills are conceived *in verbis ipsissimis*, and made by testators in the same situation and circumstances; for it is sure strange to contend, that the will of a duke and a mechanic can be made with the same views. The first will probably be a mere will of pride, the other possibly of affection and equity; and if the intention of the testator is to be followed (which all agree, if it does not contradict a rule of law [s]) the same words may reasonably receive a different construction.

As for the objection, *that advocates would not know how to advise their clients, if precedents were not followed*, I should think it may be still more easily answered: the advocate should read the will, and find out the testator's intention, without considering what determinations have been made upon other wills; and I remember to have heard a learned judge, within these few years, thank the bar, for not having, in an argument upon a will, cited any cases, as every will was to stand upon its own bottom. If it would not be thought too presumptuous, I would venture still to go further and contend, that the same rule should prevail with regard to the construction of a deed; nor is it proper to suppose, that they are all drawn with the strictest accuracy and best advice, when it is well known, that the greater part are never revised, but by those whose imperfect knowledge of the law is, perhaps, rather productive of more errors, than if the deed was penned

Lindenbrogue and Baluzius, whether the Germans had this power or not, as Mabillon, observes, that in the early ages *testamentum* signified any kind of contract. De Dipl. p. 3.

[s] As if a testator *devises a perpetuity*, which he cannot do by *any words*, though most clearly expressive of his intention.

by one who had not had what is called a professional education. It is in short to suppose what is contrary to the fact, and every one's experience; and an argument built upon such a supposal can never carry with it, or deserve any great weight.

STATUTES MADE AT WESTMINSTER,

31 Hen. VIII. A. D. 1539.

THIS session of parliament is remarkable, not only for some of the laws which continue in force, but likewise for others which were preferred, and rejected, as well as some which passed indeed, but were either repealed, or suffered to expire. The manuscript *Calendar* of the Journals of the house of Lords begins with this reign, and by that it appears, that in this year, viz. 1539, a bill was preferred to the house of Lords, by the lord chancellor, concerning husbands and wives, together with a book containing diverse heads thereon. We have no further light from the *Calendar* with regard to this bill, which must be allowed to have an extraordinary title. I should suppose, however, that the purport of it was, to make divorces and separations more easy; and that the book, which the chancellor brought with him to the house, was a treatise, written by Henry the Eighth, on that subject. He is well known to have been a man of letters [1], and to have entered the lists as a polemical divine: his own divorce from *Katharine of Arragon* having raised so warm a controversy, it is probable he had read much upon this particular subject; and it must have made the deeper impression, as he was so much interested in the decision of that point.

The 8th chapter of this statute enacts, that the king with the advice of his council, may set forth proclamations, under such pains and penalties as he shall think proper, provided they do not extend to forfeiture of land or life; and if any one leaves the kingdom, with intention to avoid a prosecution thereon, he is adjudged to be a traitor. This statute is most properly repealed by the First of Edward the Sixth, and must be allowed to be, perhaps, the most unconstitutional of all the tyrannical acts of this reign. The latter part of it is so

[1] He was, likewise, very musical and a composer. An anthem of his composition is frequently sung at Christ church cathedral: it is what is called a *full antbem*, without any solo part, and the harmony is good.

singular, that it must have been occasioned by an intention to issue a proclamation, which would have immediately affected some particular person, who would probably leave the kingdom. I must admit, however, that I cannot, from the history of the times, discover what person was in view.

The 10th chapter is entitled, *for placing of the Lords*; and the Calendar of that house informs us, that it was presented by the lord chancellor, and *by the king's especial command*. Bishop Burnet, in his history of the Reformation, observes upon some mistakes of Selden, with regard to this statute:

“ There is another act, which but collaterally belongs to
 “ ecclesiastical affairs, and therefore shall be but slightly
 “ touched. It is the act of the precedency of the officers
 “ of state, by which the lord vice-gerent has the precedence
 “ of all persons in the kingdom, next the royal family: and
 “ on this I must make one remark, which may seem very
 “ improper for one of my profession: especially when it is an
 “ animadversion on one of the greatest men that any age has
 “ produced, the most learned Mr. Selden. He, in his Titles
 “ of honour says, ‘ That this statute was never printed in
 “ the statute-book, and but incorrectly by another, and that
 “ therefore he inserts it literally as is in the record.’ In which
 “ there are two mistakes. For it is printed in the statute-
 “ book that was set out in that king’s reign, though left out
 “ in some later statute-books; and that which he prints, is
 “ not exactly according to the record. For as he prints it,
 “ the bishop of London is not named in the precedency;
 “ which is not according to the parliament-roll, in which the
 “ bishop of London has the precedence next the archbishop
 “ of York; and though this is corrected in a posthumous
 “ edition, yet in that set out by himself, it is wanting: nor
 “ is that omission among the errors of the press, for though
 “ there are many of these gathered to be amended, this is
 “ none of them. This I do not take notice of out of any
 “ vanity, or humour of censuring a man so great in all sorts
 “ of learning; but my design is only to let ingenious persons
 “ see, that they ought not to take things on trust easily, no
 “ not from the greatest authors [u].”

[u] Burnet, vol. i. p. 264.

The 13th chapter of this statute laid the ax to the root of popery, by the dissolution of monasteries and abbies. Bishop Burnet informs us, that previous to this dissolution there was a book written by one Simon Fish, of Gray's-Inn, entitled *The supplication of the beggars, against the strong and idle*, which was presented to the king by Anne Boleyn, and had at that time a great run. The preamble recites a *voluntary and free surrender* [w] by the ecclesiastical houses, which I shall, without hesitation, add to the list of statutes which recite falsehoods.

It is generally supposed, that this dissolution of monasteries occasioned the provision for the poor in the latter end of queen Elizabeth, which I should much doubt. In the first place I do not find, that great numbers of poor are subsisted by the monasteries, which continue still in the Roman Catholick countries; and Dr. Ducarel informs us [x], that he paid a particular attention to this in the province of Normandy, and could not find that the poor had any very considerable charity, or support, from the religious houses: besides this, the forty-third of Elizabeth was near sixty years after the dissolution; and if the poor, at any time, found the difference, it must have been more sensibly felt in the first years after this statute took place.

Though the law was not probably attended with that most terrible and inhumane consequence, the starving of the poor; yet I should imagine, that it was the occasion of a great increase of law suits. Roper, in his life of Sir Thomas More, informs us, that Sir Thomas, who was an advocate of the greatest eminence, and in full business, did not, by his profession, make above four hundred pounds per annum; and there is a common tradition in Westminster-hall, that Sir Edward Coke's gains, at least, equalled those of a modern attorney-general [y]. It is likewise said, that the value of

[w] The form of this surrender may be seen in Burnet's History of the Reformation.

[x] In a tour through Normandy, published in 1755.

[y] It hath been suggested to me, since the former edition, that it appears by Lord Bacon's Works, that his gains (as attorney-general) amounted to 6000 l. per ann.

the places of the prothonotaries [z] of the common pleas, in the reign of Queen Elizabeth, were at least ten thousand pounds per annum. These facts seem indubitably to prove, that, soon after the present statute, the business of the courts of Westminster-hall had infinitely increased [a]. The dissolution of the monasteries threw that land into circulation, which before was unalienably fixed in a religious house; and it may be remarked that colleges have very few law suits, being flux bodies, they choose the immediate dividend, rather than wait the event of a tedious and expensive law suit.

The compilers of the parliamentary history mention the having seen an edition of *Fabian's Chronicle*, in which the word *Pope* is erased throughout, and from thence suppose a proclamation to have issued this year, in which it was forbid to use this odious name. It should, perhaps, be rather attributed to the indiscreet zeal of some enthusiastick reformer.

Protestantism hath been so long established in this country, and to it's so very great improvement and prosperity, that one may venture to mention a supposed advantage to Christendom, from the great influence and ascendancy which the popes formerly claimed, without being suspected of being tainted with the gross absurdity of the popish doctrines, or a wish to see them re-established. As Englishmen, we are particularly indignant at the submission made by king John of his crown and rights to the see of Rome (and with reason); but still there was a great use to Europe in general, from there being a common referee in all matters of dispute, who could not himself ever think of extending his dominions, though he often might make a most improper use of his power as a mediator [b].

[z] Possibly there was at that time but one prothonotary instead of three.

[a] If it should be asked what may have occasioned the present great decrease of law business, I should suppose that it arises from the stamp duties, and the law being more certain, and understood upon principles, but chiefly from 120 millions being vested in the funds, with regard to the security of which no dispute can arise. I suppose by this, the remaining part of the national debt to belong to foreigners.

[b] The popes have raised most exorbitant contributions upon the different countries of Europe, professing Christianity, by every kind of abuse; but they have seldom thought of extending their dominions, and the papal territories are not believed at present to be much larger than they were many centuries ago.

Must not a Protestant then admit, that (when the weaker power was oppressed by the more powerful, and when there were no alliances between the different parts of Europe to support each other with a certain number of troops, in case of an attack) there was often convenience in appealing to a mediator, who by the terror of his anathemas might say, and say with effect, Your conquest and oppression must not extend any further, *I have taken the oppressed under my protection?* and was not England delivered from a foreign army in the centre of the country, and that chiefly by the intercession and menaces of the pope [c].

The 14th chapter of this statute is entitled, "*An act for abolishing diversity of opinions in certain articles concerning the Christian religion,*" and which I should not have observed upon, did not Grafton in his Chronicle inform us, that it was called *the Bloody Statute* [d].

[c] The army of Lewis, the son of Philip of France, who acted not barely as an ally of the barons, but actually claimed the crown of England.

[d] Grafton's Chron. p. 174.

STATUTES MADE AT WESTMINSTER,

34 and 35 Hen. VIII. A. D. 1542-3.

THE first chapter of the statutes of this year is levelled against the *false translation* of the Bible by *Tindal*; and likewise directs, that the New Testament, in English [e], shall not be read by *women, artificers, 'prentices, journeymen, serving men of the degree of yeomen, or under.*

The original name of this *Tindal* was *Hitchens* [f]: he travelled much in Germany; and printed his translation of the New testament at Antwerp in 1526, and afterwards both the Old and New Testament at Paris in 1536 [g]. Bishop Burnet informs us, that the opposition to this translation arose from the convocation [h], who, within three years afterwards, published another translation under their own inspection; and yet it is very singular that he does not give us the names of those who were thus employed by authority [i].

It is generally supposed, that the English of the Bible hath fixed our language, which seems to have been too implicitly admitted. Surely the modern English differs much, both in

[e] In the year 1539, a proclamation issued *De bibliis in vulgari non edendis*, Ames's history of Printing, p. 542; and, in the year 1541, another proclamation issued, that there should be a Bible in every church, Fab. Chron. 546. The Bible was not translated into Welsh till the year 1567, in consequence of 5 Eliz. ch. viii. which gives a very extraordinary reason for it, viz. that it might promote the knowledge of the *English* tongue in Wales: it was not translated into Irish till the year 1685.

[f] Tanner's Bibl. Whilst he was in Germany, he assumed the name of Thomas Matthew.

[g] Ames's history of Printing.

[h] There is in Rymer a proclamation in *English* of the year 1539, which is entitled, *De bibliis in vulgari edendis ex supervisione domini de Cromwell*: Tyndal had therefore probably neglected proper application and respect to the *Vicar-general*.

[i] Fabian, in his Chronicle, says, that the Bible was translated into English by one Trevis of Cornwall, in the reign of Richard the Second. There is now in the Museum a very fine manuscript in vellum, of a French translation of the Bible, which was found in the tent of king John of France after the battle of Poitiers; and Bullet (in his *Memoires de la langue Celtique*) mentions a French translation of the Psalms in the king's library, which is as ancient as the eleventh century.

words used and in the phraseology, from the translation of the Bible, and comes infinitely more near to the English of the legislature in their acts [k]. I have already observed these to have continued in the *maternal tongue* (as the statutes of this reign frequently term it) from the reign of Richard the Third down to the present times [l].

The 26th chapter of this session is possibly the longest in the statute-book (it being divided into 130 sections) if we perhaps except a modern land-tax act.

The title of it is, *An Act for certain ordinances in the king's dominion and principality of Wales*, and contains a most complete code of regulations for the administration of justice, with such precision and accuracy, that no one clause of it hath ever yet occasioned a doubt, or required an explanation. Though the calendar of the lords journals begins with the first year of this reign; yet I cannot find any thing relative to this most excellent law; and therefore the principality must for ever remain ignorant of their greatest patriot, and benefactor [m].

The statute begins by dividing Wales into twelve shires; and Lord Herbert of Cherbury, in his life of Henry the Eighth, informs us, that before this it consisted of 141 lordships marchers, with *jura regalia*; and that the great view of the statute was to reduce the jarring laws and customs of these lordships to uniformity.

Previous steps had been indeed taken to introduce a thorough union of laws between the two countries, by statutes which passed in the twenty-sixth year of this king's reign.

[k] Villadiego (in his preface to the *Fuero Juzgo*) gives us a much more extraordinary instance of the purity of the Spanish language used in their ancient laws, which he affirms to be more intelligible, than the language of other laws made six hundred years afterwards.

[l] The English of the statutes of Richard the Third and Henry the Seventh is more pure than those of the reign of Henry the Eighth, which arises from the preambles of the latter being more figurative in the expression.

[m] There were no representatives for Wales at this time in the house of commons, and the Journals of that house do not begin till the reign of Edward the Sixth. I cannot find any light from the Sydney papers, which might naturally be expected, as Sir Henry Sydney was now lord president of the marches.

One of these [n] most particularly enjoins, that the jurors in Wales, who are recited to be frequently tampered with, should not, without leave of the court, be permitted to have either meat or drink [o], which shews, that for some time the trial by jury had prevailed in those parts of the principality at least, where there had been an opportunity of introducing the English laws; and it is for this reason that the present statute continually refers to, and approves of, the laws used in the three maritime counties of North-Wales, because Edward the First, and his successors, by means of their garrisons in those counties, were the better enabled to enforce the establishment of the English laws.

Another regulation [p] is, that no *Welshman* may carry with him to a court of justice, or place of publick resort, any kind of offensive weapon; which shews that there were frequently great riots and insurrections in the principality. *Johannes Major*, however, who lived at this time, says, that the custom of going armed was by no means peculiar to Wales, "*In Anglia ad templum, sine forum, sine armis vadit nemo*" [q]."

But the most material previous regulation, is that of the 37th section of the twenty-seventh of Henry the Eighth, by which it is enacted, that the lord chancellor, immediately af-

[n] 26 Hen. VIII. ch. iv.

[o] The ill effects of a bribe to a jury, by better meat and drink being given to them by one party than another, are not now apprehended, though I am persuaded this was the original cause of its being forbidden; yet I must admit, that Sir Henry Spelman derives it from an ancient canon, "*quod de nocte non est honestum*" "*judicium exercere.*" Rel. Spelm. p. 89. which at the same time accounts for the jury being denied candles, if the leave of the court is not obtained. We now think the regulation a wise one, and adhere to it, because it contributes to the greater dispatch of business; causes at this time, however, did not *hang* as they do at present: one reason for which (amongst many others) arose from all witness in civil causes being examined by the judge, as is still the practice at the crown bar. This information with regard to the ancient practice, I remember to have heard from an aged and eminent serjeant, who likewise believed the first precedent for an adjournment to have been within these thirty years. Adjournments are, by the great diligence and spirit of the present bench, avoided as much as possible: if a cause, however, lasts more than sixteen hours, it is ridiculous to call it a decision, as human attention to the evidence cannot be longer expected.

[p] By 26 Hen. VIII. ch. vi.

[q] This appears likewise by the common etymology of the word *Wapentake*.

ter the prorogation of parliament, shall issue the king's commission, to inquire and search out, by all ways and means, all and singular laws, usages, and customs, used within the said dominion and counties of Wales, and return and certify them to the king in council.

This return, therefore, must have been made (though I cannot find it in Rymer) and must contain many curious particulars, upon which the present most complete and comprehensive law of the thirty-fourth and thirty-fifth of Henry the Eighth was undoubtedly framed.

I have already said, that this statute is so clear, that it never hath required any parliamentary exposition [r] or alteration, much less does it want my illustrations; and the more so, as the great Lord Bacon hath barely abridged some of the regulations [s], thinking that they spoke sufficiently for themselves. Mr. Justice Dodderidge hath done the same in his account of the principality of Wales, without any observations, except that *the justices of the great session have the same powers with the ancient justices in Eyre*. He could not mean by this, that the justices in Eyre had the powers of deciding causes in a court of equity, which the justices of the great session have so long exercised, that it cannot be now disputed. How they originally obtained this jurisdiction [t] is rather dark, as in the present statute, which most particularly enumerates every officer in the courts of law, there is no mention made of any officer for the court of equity.

[r] By 5 Eliz. ch. ix. (the title of which is, "An act for the punishment of such as commit perjury") there is a clause declaring, that witnesses properly served with notice to appear before the courts of great session in Wales, and who neglect attending, shall be liable to penalties and damages. This I should apprehend however to have been unnecessary. As these courts were constituted by parliament, and with the full powers of the superior courts in Westminster-hall, the attendance of witnesses when summoned seems to follow as a necessary consequence.

[s] Bacon's Law tracts.

[t] By a manuscript of all the king's officers, in the first year of Queen Mary, it appears, that Roger Vaughan was chancellor of Brecknock, with a fee of 6 l. 8 s. but Walter Devereux, viscount Hereford, was at that time Justice: Sir John Salisbury was likewise then chancellor of North-Wales, and William Cook was Justice; so that the offices in that reign were considered as distinct.

By the 37th chapter of the twenty-seventh of Henry the Eighth the king is indeed empowered, *for the next five years, to erect and constitute what courts he shall please*; during which time he might probably have instituted the present courts of equity in Wales; but it is still singular, that this statute should be entirely silent, with regard to any such court or officer belonging to it.

Bishop Godwyn, in his life of Henry the Eighth, much commends this statute, and union between England and Wales; and says, that the good effects of it were fully experienced at the time he wrote; from these effects and advantages, he strongly presses an union with Scotland.

Henry the Eighth lived to hold two sessions of parliament after this; but nothing occurs in the statutes of those years, which is deserving of particular notice or observation.

He began his reign with the greatest expectations of his people, and in this (according to Bishop Godwyn) they were not deceived in the twelve first years, which may be compared to the *Quinquennium Neronis*. He was, in the early parts of his life, magnificent and generous; but afterwards his prevailing passion appears to have been that of despotism and tyranny, attended with no small degree of cruelty: he was the first king of England, who was styled *metuendissimus*; and no predecessor, or successor, ever equally deserved the epithet [u].

He was learned beyond the common learning of a king [w]; and Bishop Burnet informs us, that he had seen many statutes, if not entirely drawn by him, at least altered and corrected with his own hand: his pen may, therefore, be said to have often been dipped in blood, as every session almost produced new treasons and felonies. Hollinshed asserts, that 72,000 crimi-

[u] If we are to believe however the Journals of the house of Lords, never was the death of a king more lamented by his subjects. "Quæ mors dici non potest quam erat luctuosa omnibus, et tristis auditu. Cancellarius vero ipse vix potuit præ lacrymis effari. Tandem vero, sedato fletu, et reffectis animis omnium recordatione principis Edwardi Sexti," &c. Appendix to Bedford's hereditary right, p. 19.

[w] Lord Bacon, in the short sketch of an intended history of the reign of Henry the Eighth, says, that, "though his learning was considerable, yet therein he came short of his brother Arthur," vol. iii. p. 115.

nals were executed during his reign, which would amount nearly to 2000 a year; whereas he says, that, in the latter end of Queen Elizabeth's (when he wrote), the number did not exceed 400 [x]. I must own, I cannot but think that there is either great exaggeration in the account or an egregious mistake in this chronicler, who is generally very accurate; for though I believe that the world rather improves in point of morality, and social duties, from century to century, yet this is too great a disproportion in the comparative number of criminals, who might be condemned to suffer [y].

We should not dwell, however, entirely on the blameable part of *Henry's* character as a legislator; but consider, on the other hand, if some laws may not have passed during his reign, which may make him deserve to be remembered with gratitude by posterity.

Those who conceive him to be a mere tyrant have supposed that all the statutes against popery (which have established both our civil and religious liberties, ever so closely connected) have proceeded entirely from a desire to change one wife for another. If this might have had its weight upon particular occasions, it is too much to suppose, that it was always the sole motive of the steps which he took to deliver his kingdom from this most ignominious and intolerable thralldom; and it is more becoming those, who feel the benefits of salutary regulations, to attribute them to good, than to bad motives, unless the proof is nearly irrefragable. Whether this merit may, therefore, be allowed to him or not, his having united Eng-

[x] It is not believed that there are 100 criminals executed in a year at present; and the county of Middlesex furnishes a considerable part of them. Brunau, in his treatise upon the criminal law of France (printed at Paris in 1716) mentions the same kind of disproportion between the number of executions at that time in France, and a century before: I cannot, however, but distrust the account given by Hollinshed.

[y] The milder punishment of transportation may indeed prevent many executions; but in the time of Henry the Eighth, there seems to have been no alternative in capital offences but death, or a very long imprisonment. Fortescue, who was chief justice in the reign of Henry the Sixth (in his treatise on Limited monarchy) gives this reason for the number of executions in England, which is rather an extraordinary one from the mouth of a great magistrate. "More men are hanged in *Englonde* in one year, than in *Fraunce* in seven, because the *Englishe* have better bartes: the Scotchmenne likewise never dare rob, but only commit larcenies," p. 99.

land and Wales, by a wise establishment of uniformity in their laws, should never be forgotten by the two countries, when his tyranny and oppressions are dwelt upon; nor could the Reformation perhaps have been thoroughly established, if the king on the throne had not had an extraordinary firmness of character.

STATUTES MADE AT WESTMINSTER,

1 Edw. VI. A. D. 1547.

THE 12th chapter of this statute repeals most of the new treasons and felonies during the reign of Henry the Eighth, and recites, "That subjects should rather obey from "the love of their prince, than from dread of severe laws ; "that as in *tempest or winter*, one course and garment is "convenient, and in *calm or more warm weather* a more liberal case, or lighter garments, both may, and ought to "be followed and used, so it is likewise necessary to alter the "laws according to the times."

After this very singular preamble, it occurs to the legislature, that some of the offences, which had been made capital by Henry the Eighth, were proper to be restrained by the same severity of punishment ; and therefore they excluded those who shall be guilty of murder, house-breaking, sacrilege, robbery, or stealing of horses, *geldings or mares*, from the benefit of clergy.

This is the clause upon which the *well-known doubt* arose whether stealing a single horse was to be punished with death, and which afterwards required an explanatory statute. It seems, indeed, rather extraordinary, why this should be classed with crimes of the blackest dye, but *Hollinshed* [x] takes notice that it is one of the most common offences at this time in a criminal calendar : he likewise mentions the name of a particular thief, who had at once sixty stolen horses in his possession ; and that if a buyer would not give him his price, he used to say, "*that he had given more himself, or otherwise by Jesus he had stolen him.*" In the year 1584, ten criminals were executed at *Smithfield* for this crime [a].

The 13th section takes away the benefit of clergy from him who shall murder by poison, in the following words : "Pro-

[x] Hollinshed, vol. i. 186.

[a] Stowe's Chron. p. 697.

“ vided also, and be it ordained and enacted by the authority
 “ afore said, that the wilful killing by poyson of any person or
 “ persons, that at any time hereafter shall be perpetrated, or
 “ committed, shall be adjudged, deemed, and taken to be
 “ wilful murder of malice prepensed.”

What could have been the occasion of this very extraordinary clause must naturally be asked by every one who reads it. Mr. Justice Foster, in his Reports [6], hath taken notice of the different opinions of Coke, Kelyng, and Holt, on this part of the law; with none of which he appears to be satisfied, though it should seem to be doubtful whether his own solution of the difficulty may have been more happy. I shall give it in his own words:

“ I take the true ground of the statute of the First of Edward the Sixth to be this; the twenty-second of Henry the Eighth had made wilful poisoning high treason, and had expressly excluded the offenders from clergy, and directed that they should be hoiled to death. The First of Edward the Sixth reduced all treasons to the ancient standard of the twenty-fifth of Edward the Third. This was a virtual repeal of the twenty-second of Henry the Eighth, and so in the judgment of the parliament it became necessary to make some new provision for the case of wilful poisoning, which undoubtedly deserved a capital punishment; accordingly by the 10th section of the act, the offenders are ousted of clergy. And the 13th enacteth, not in affirmance of the common law as Kelyng supposeth, but by way of revision of it, that the offence shall from thenceforth be deemed wilful murder of malice prepensed, and that the offenders shall suffer and forfeit as in other cases of wilful murder of malice prepensed.

“ The taking away clergy by express words, which is done by the 10th section, was, in my opinion, though Coke thinketh otherwise, absolutely necessary; because the statutes, which ousted clergy in the case of wilful murder, were made while the offence of wilful poisoning did not

“ fall under the denomination of murder, but of high treason,
 “ in which the crime of murder was merged : and consequent-
 “ ly, those statutes could not reach the offence of wilful poi-
 “ soning.”

The statute of the twenty-second of Henry the Eighth, al-
 luded to by Mr. Justice Foster, is printed at length in Rastall's
 edition; and by the preamble it appears, that one John Roofe,
 a cook, had poisoned seventeen persons of the bishop of Ro-
 chester's family, two of which died. John Roofe, therefore,
 by a retrospective law, is made guilty of high treason, and he
 is ordered to be thrown into boiling water, the idea of which
 new punishment probably arose from Roofe's having been a
 cook [c].

Shocking as this crime must have been considered by the
 legislature, yet it was not thought proper to confound it with
 the offence of treason; the statute of king Henry the Eighth is
 therefore repealed; but could it possibly follow from this,
 that killing by poison did not continue a murder by the com-
 mon law? and if a misdemeanor is made a felony by a statute,
 which is afterwards repealed, does it not continue a mis-
 demeanor as before? The statute, whilst it continues in
 force, supercedes, indeed, the common law; but when it is
 repealed, the common law is of course restored.

[c] He threw the poison into a pot of gruel, which was prepared not only for
 the bishop of Rochester's family, but the poor of the parish, so that it might have
 probably been large enough for his execution. There is another instance of a
 retrospective statute to punish a murderer, in the second and third year of Philip
 and Mary, and which is published likewise at length by Rastall. The preamble
 is a very long one, and recites a malicious and groundless appeal of robbery by
 one *Bennet* against *Giles Rufford*, on which *Rufford* having been acquitted, and
 having afterwards convicted *Bennet* for the malicious prosecution, he not only pro-
 mised and paid 40*l.* to two men for the actual murder of *Rufford*, but likewise
 supplied them with javelins and a dagger for this diabolical purpose. Horrible as the
 offence was, yet *Bennet*, having been absent at the time the murder was committed,
 could only be considered as accessory; and the statute of Henry the Eighth, which
 takes away the benefit of clergy from murderers, not having made mention of the
 accessory, according to the too mild construction of these laws, *Bennet* was entitled to
 this privilege, which therefore the statute deprives him of in case he is convicted.
 I have ventured to call this construction too mild, though of laws which are most
 highly penal, because in treason, which is a still higher offence, there is no such
 thing as an accessory; and, in the above case of *Bennet*, there can be no doubt of
 his having been equally culpable with those who actually committed the murder.
 The 4 and 5 Philip and Mary, ch. iv. very properly therefore takes away this
 privilege, from accessories before the fact in murder, and many other offences, as do
 likewise more recent statutes, which have gone still further.

Perhaps,

Pethaps; the truest reason and solution of these difficulties is the most obvious, viz. the great ignorance of the penner of the law, of which there are not wanting very sufficient proofs in other clauses of the statute. I have already mentioned part of the preamble, which is even ridiculous; and the insertion of *mares* and *geldings* after horses, is another proof of this ignorance; as for the same reason a doubt might be raised, whether if a statute makes the murder of a man felony, it might be doubtful whether it extended to that of a *woman*, or an *eunuch*:

If I may presume, however, to risque my conjecture, with regard to the occasion of this very singular clause, it is the following:

It was at this time a prevailing notion, that what was called *slow poison* [d] might be given to a person, which would infallibly kill him within a given number of months; or years. By our criminal law, if the death of the person murdered does not ensue within a year and a day, after the stroke or stab given, it is not considered as murder [e]. The legislature might therefore intend, that such poisoning should have all the consequences of a murder, provided the death ensued within a year and a day; and for that reason directs, that they shall suffer as for a murder of *malice prepensed*, though *no stroke or stab* had been given [f], as the proof of the death occasioned by so lingering an operation, must have been attended with infinite difficulty.

[d] Lord Bacon (in his tenth century of Experiments) hath the following passage: "The imposition of particular persons by odours, hath been reported to be in perfumed gloves, or the like. Plagues also have been raised, by anointing of the chinks of doors, not so much by the touch, as for that it is common for men, when they find any thing wet upon their fingers, to put them to their nose." Exper. 916. This notion of a slow poison is now exploded by modern physicians, who have accordingly struck out all the antidotes to prevent the effects of it from the new *Pharmacopœia*.

[e] By the laws of Bretagne, the death must ensue within forty days (D'Argentre) which seems to be a better rule in favour of the person accused, as it is believed to be often very difficult for a surgeon, or physician, to say, when so much time hath elapsed, whether the blow was the occasion of the death or not, especially if the bruise is inward. The year and day being thought by the legislature too distant a time by 2 James I. ch. viii. (commonly called the *Strabbing act*) the death must ensue within six months after the stab.

[f] I take this to be the meaning of the maxim in the French law, "*tel cuide ferir, qui tue*."

This most horrid and atrocious of all crimes, the murdering by poisons, cannot but alarm every member of society, who, if he harbours such a suspicion, must be the most unhappy of wretches, it fortunately, however, carries with it, from the manner of its being perpetrated, its own check. He who hath the diabolical malice to intend the murder of his fellow creature, but half gratifies that malice, if the person killed does not know that he receives his death from the hand of his enemy.

As no human precaution, however, should be omitted to prevent the possibility of the crime's being perpetrated, it may not, perhaps, be improper to adopt the policy of an ancient Scotch statute [g], by which it is made high treason to bring any poison into the kingdom [h]. Might it not therefore be proper to make it capital, either to import, or vend some kind of poisons in England, as the chief pretence for an apothecary's having arsenick in his shop, (which is the poison most commonly used by the murderer) is for the destruction of rats, which may be destroyed by other methods; or at least, should it be permitted; but under certain restrictions?

This is the only statute of the short reign of this infant king, which seems to require any illustration. There were indeed four sessions of parliament, during which several laws were enacted; they rather consist, however, of statutes repealing what was done by the parliaments of the preceding reign, than make any considerable alteration in the common law. As for those which relate to the further establishment of the Protestant religion, I shall refer the reader to Bishop Burner's History of the Reformation, as they are a most necessary part of that learned work.

[g] Jam. II. Parl. 7. ch. 30. Baynes however (in his Institutes of the criminal law of Scotland) says, that this statute is considered as being in *disuetude*: Edin. 1730. p. 131.

[h] It was probably by this chiefly intended to provide against the importation of poisons from Italy, where assassination, and this kind of murder, hath but too much prevailed. I have been informed that it is not uncommon in Italy to say, upon a man's expressing himself with regard to another, from whom he hath received an injury, *I wish he would but drink a dish of chocolate with me.*

Edward was but nine years of age when he came to the throne, and died before he was sixteen. It is fortunate for the memory of these infant kings, and infant princes destined to a throne, that, as they cannot offend any party or faction, in the state, they are always represented by those employed in their education, as being of a most promising disposition [i] and genius, by which part of the commendation due is reflected upon the instructors; and when any unpopular act is done in the succeeding reign, it is always supposed that the reverse would have happened, if the infant predecessor had lived to that time.

There are not, however, wanting proofs, that Edward had abilities rather *ultra annos*, and that he paid a very early attention to the laws, which passed during his reign. The manuscript of a journal, which he kept, is printed in Bishop Burnet's History of the Reformation; and in the original (which is now in the Museum) the gradual improvements both of his understanding and hand-writing may be seen to keep pace from year to year: the first part is a scrawl of a child, which is scarcely legible. This Journal contains many schemes for improvements, and particularly with relation to the woollen manufacture, the inclosing of waste grounds, and the preventing the offence of forestalling, as also that of the sale of offices [k]; with regard to every one of which points, statutes passed at the latter end of his reign, and in which he may therefore be supposed to have been consulted by his ministers.

[i] Thus Henry, prince of Wales, son of James the First, is supposed to have been a most promising prince; and the duke of Gloucester, son of queen Anne.

[k] It appears by the Calendar to the Journals of the house of Lords, that the Commons, for a considerable time, insisted that the clause in 5 and 6 Edw. VI. ch. xv. which allows the two chief justices to sell certain offices, should be rejected.

ACTS MADE AT WESTMINSTER,

1 Maria R. A. D. 1553.

THE first parliament of this reign was (after different prorogations) held at three different sessions, of which no instance hath before occurred. There passed but one law during the first of these sessions, and that a most truly constitutional statute, which reduced all treasons to those which were declared to be such by the twenty-fifth of Edward the Third. The new treasons, during the reign of Henry the Eighth, were those chiefly intended to be repealed; and some of the members of this parliament exclaimed with proper warmth against the severity of his laws, saying, *they were more bloody than Draco's, Dionysius's, or any other tyrant in history* [1].

The preamble to this most excellent law is to the same purport with that of the statute of Edward the Sixth (last observed upon); but is so much superior in style, that I shall here insert part of it for the sake of the comparison.

“ Forasmuch as the state of every king and ruler standeth more assured by the love of the subject towards their sovereign, than in the dread and fear of laws made with rigorous pains; and laws also justly made for the preservation of the commonweal, without extreme punishment or rigour, are more often obeyed and kept, than laws and statutes made with extreme pu-

[1] State Trials, vol. i. p. 76. It may be perhaps not improper here to mention one or two out of many of these tyrannical laws. By 32 Hen. VIII. ch. xxv. it is made high treason by word or deed to accept, take, judge, or believe, the marriage between this king, and the *Lady Anne of Cleves*, to be good. By 33 Hen. VIII. ch. xiv. it is made felony to declare any false prophecy upon occasion of *arms, fields, or letters*, which statute is printed at length by Rastall, and the preamble explains the occasion of it.

“ nishments,

“niftments, &c.” This is the language of a legislator promulgating his laws with dignity: that of the statute of Edward the Sixth is the idle flourish of a rhetorician, or rather half-learned school-master [n].

It is very singular, that the first statutes, both of the preceding and present reign, should open with such strong reflections on the laws and government of Henry the Eighth. This is indeed not uncommon when a kingdom hath been disputed; but no such instance can, perhaps, be found in history, when two children have succeeded to a throne which they received from their father; and it shews most strongly, in what detestation those tyrannical statutes were universally held.

Four years after the passing this most constitutional law, Sir Nicholas Throckmorton often insisted upon it in his defence [o], but was little regarded by the court. Staunford, the writer upon the pleas of the crown, had the conduct of the prosecution, as king's serjeant, and had been strenuous for this act as a member of parliament, though by the account given of this trial, he appears to have entirely forgotten what he had so strongly contended for: the jury, however, to their great honour respected the law (though the court and prosecutor considered it as a dead letter) and acquitted the prisoner.

Between this first opening of the queen's reign, and her marriage the next year, the tone was much changed; for in the preamble to the first and second of Philip and Mary, ch. x. it is recited, “That the great mercy and clemency

[n] The language of the preamble to a subsidy granted in 37 Hen. VIII. ch. xv. (and which is printed at length by Rastall) is so singular, that it will best plead my excuse for here inserting it: “We the people of this realm, have for the most part of us so lived under his majestie's sure protection, and yet so live, out of all fear and danger, as if there were no warre at all, even as the small fishes of the sea, in the most tempestuous and stormie weather doe lie quietly under the rock, or bank side, and are not moved with the surges of the water, nor stirred out of their quiet place, howsoever the wind bloweth.” It appears likewise by this subsidy, that the lords expressly join in the grant, though it hath of late been otherwise contended. The lords likewise join in the grant of a later subsidy, viz. in the first year of Queen Elizabeth, which statute is likewise printed at length by Rastall.

[o] State Trials.

“ heretofore declared by the queen’s highness in releasing
 “ the penal laws made by her progenitors, had given occasion
 “ to many *traiterous and cankered hearts*, to stir the people to
 “ disobedience.”

Another statute passed in the present reign, which hath occasioned a very considerable alteration in the common law, with regard to the conviction of criminals [p], by which justices of peace are directed to take their examinations, which they are to reduce into writing *within two days*, and certify them to the next gaol delivery. It seems to be generally agreed, that before this statute no such examination could have been taken, as it tended to make the prisoner charge himself; I should doubt much, however, whether this was not before practised; but as few could read, and still fewer could write, neither the justice nor his clerk were capable of using this help to their memory, but proved the confession, perhaps, at a great distance of time, and when it was too inaccurate to be depended upon.

I shall not have occasion to observe upon any other statutes [q] of this reign: as for the queen’s consort Philip the Second, he knew so little of our language, or constitution, that he cannot be supposed to have interfered greatly in legislation. With regard to the queen herself, she is known to have been a most unhappy woman,

[p] 2 and 3 Philip and Mary, ch. x. Montaigne says somewhere, *a tuer ses gens il faut une clarté bien lumineuse, et nette*.

[q] There is indeed a statute of the first and second of Philip and Mary, which relates to a very singular inconvenience in Glamorganshire, of *hawing their lands covered with sea sands*; the law with this view gives powers to the commissioners of sewers to prevent it. The only effectual means, however, of stopping this prejudice to the adjoining lands, is by encouraging the growth of the *juncus acutus capitulis sergbi**, and which should not be suffered to be destroyed, as it too often is.

“ Si quis spinas, sentes, et dumos in promontorio juxta mare occidentale crecentes eruerit, extirpaverit, aliove modo exciderit, tam ipse qui delictum hoc admittit quam qui auctoritatem ei accommodavit (citra spem gratiæ) præter damni reparationem, furti poenæ obnoxius erit.” Leg. Dan. lib. vi. ch. xvii. art. 29. I would not be understood, however, to recommend the making this offence so penal, though it is attended with very bad consequences to those who have lands near a sandy beach.

and had so many domestick concerns, that she probably left the direction of her affairs entirely to her ministers. Her intentions upon her accession to the throne seem to have been good, as appears by the statute of *treasons*; for the latter part of her reign, her *confessors* should chiefly answer.

STATUTES

STATUTES MADE AT WESTMINSTER.

43 Eliz. A. D. 1601.

THE 2d chapter of the laws of this session is the well-known statute *with regard to the maintenance of the poor*. I have before observed, that these regulations could not have arisen from the dissolution of the monasteries (as is generally supposed) because sixty years had intervened; and if the poor were at any time distressed by there being no religious houses, that distress must have been most sensibly felt immediately after the statute of Henry the Eighth. Besides this, though the monasteries were numerous in England, yet it is impossible to suppose they were so conveniently dispersed, that in all parts of the country the poor could be subsisted by their charity, though never so extensive and unbounded.

The 5th chapter of the fourteenth year of this queen [r] had directed, *that assessments should be made in every parish for the relief of the poor*. This statute is printed at length in Rastall, and consists of a great number of chapters; it was to continue to the end of that parliament, and was probably suffered to expire from the great severity of this law against those who are styled *vagabonds*: if above the age of fourteen, a vagabond is to be whipped, and *burned through the ear with a hot iron, the compass of an inch*; and for the second offence, he is to suffer death.

This statute of the fourteenth of Elizabeth was probably occasioned by a printed petition against the oppressors of the poor, which Ames mentions to have been dispersed with considerable

[r] There are statutes which relate to the poor more early than this fourteenth of Elizabeth, which the reader may see collected together by Dr. Burn, in his history of the poor's laws, published in 1764, 12mo. Dr. Burn hath likewise collected all the proposed alterations of this system of laws.

industry the year 1567, and which he represents to have been written with great spirit [1].

Other causes likewise concurred, as there had been no foreign or civil wars, of any consequence, for near a century preceding this statute, nor was there the present drain of the colonies, by which the mother country is by many supposed to be so greatly depopulated [1]. The consequence of this must necessarily have been a very great increase of people, which there was not sufficient trade, or number of manufactures to employ. Cock, indeed, who published a pamphlet in 1658, asserts, this increase was so much dreaded, that a poor man was not permitted to marry till the age of thirty, nor a poor woman till the age of twenty-five [2].

I cannot find in the Journals of the House of Commons, that this most important statute occasioned much debate; and it is also very remarkable, that there is no preamble to it, setting forth the motives of humanity or policy upon which it was proposed.

It appears by a letter of Mr. Aubrey, the antiquary, that it was at first by no means generally carried into execution (and particularly in Wiltshire); nor are the *poor's laws* to this day executed in the greatest part of North-Wales, though this statute most expressly extends to the principality.

Carew, who wrote his account of Cornwall in the succeeding reign, calls it, however, *the late most beneficial statute*, and King James (in his works) says, "*look to the houses of correction, and remember that in the time of Ch. 7 Popham*

[1] History of Printing, p. 272.

[1] Nor do I find either that there had been any considerable plague; and the dissolution of the religious houses might, likewise, have greatly contributed to the increase of the people. Besides the drain of the colonies, the garrisons of Gibraltar and Portmahon, as well as the regiments stationed in Jamaica and the Leeward islands, are a further cause of depopulation at present.

[2] This must have probably happened during the Protectorate, when marriages were celebrated before a justice of peace, who would not suffer any additional burthen on his estate. Fabian Phillips (in a treatise on Capias's, and process of Outlawry) speaks thus of Cock: "Mr. Charles George Cock, who was something of a common lawyer, but nothing at all of a civil, and was advanced in the time of the usurpation, to be one of the judges for the probate of wills." I find likewise by an ordinance of the 19th of July, 1659, that he was appointed, together with Dr. John Godolphin, to be judge of the admiralty.

" there

“there was not a wandering beggar to be found in all Somersetshire, being his native country [w].”

As the maintenance of the poor is in many parishes attended with such infinite expence to the landholders, it is not to be wondered at, if those who have estates are perpetually complaining of this system of laws. The first answer to which complaint is, that the expence in great measure arises from their own negligence in not following the wise directions of the law; and particularly, as the royal author above advises, by not *looking to the work-houses*. By a diligence and attention of this kind in the magistrates of Chester, the poor's rates have within these few years been reduced from eighteen hundred, to three hundred pounds per annum; and the same good consequences might be reasonably expected elsewhere, from the same attention to the management of the poor [x].

These laws are likewise complained of from their having occasioned many litigations: this objection seems to be now almost entirely removed: the different statutes (though not so clearly penned, perhaps, as they should have been) are now most thoroughly understood, and it is believed there are not at present four questions in a year (in the court of king's bench at least) upon the construction of them [y]; and to this Dr. Burn's valuable treatise hath likewise much contributed.

[w] King James's Works, p. 567.

[x] The Ynca Garcilasso de la Vega mentions, that there was no beggar to be seen in Peru, which arose from laws of the Yncas obliging children even of five years old to labour for their bread, and, if any Peruvian was incapable of labour, he was supported by the publick. These are exactly the principles upon which our poor's laws are founded, and the authority is nearly irrefragable. The Ynca Garcilasso de la Vega was born eight years after the conquest of Peru by the Spaniards, and continued at his father's house in the neighbourhood of Cusco till he was one and twenty, when he went to Old Spain. He informs the reader (in his Commentaries), that he was always particularly inquisitive with regard to the laws and customs of the native Peruvians (from whose Yncas he was descended); and though these were soon altered by the Spanish conquest, yet they continued, during his stay in the country, to be adhered to by the Peruvians, and he positively asserts, that he never saw but one beggar, who was called, by the Spaniards, *Isabel*, and being very far advanced in years, and half mad, was permitted by them to beg. *Commentarios Reales*, vol. i. p. 107. Lisbon, 1669.

[y] As for the appeals to the *Quarter Sessions*; this is a necessary and moderate expence to the county, as, without such appeals, no barrister would attend, nor can the county business be properly dispatched, without their assistance.

These

These statutes, it is hoped, however, stand upon such wise and humane principles, that they will not easily, nor hastily be repealed. The principles are, *that every one capable of working shall be employed; and that he who is incapable shall be relieved and supported by the parish*: and it should seem that a day-labourer, who hath been industrious (whilst he was able) hath as much right, when weakened by old age or sickness, to a certain support, as the worn-out soldier has to his Chelsea, or seaman to his Greenwich.

As for that support which may arise from voluntary contributions, it is but a most precarious maintenance; and supposing the gentlemen of a parish to be of humane dispositions (which is often contradicted by the fact), yet, during minorities, or other necessary absence of the men of property, this uncertain maintenance immediately fails; and in many parishes of England, and Wales, there is no inhabitant of any considerable fortune or estate.

Laws have been enacted in many other countries, which have punished the idle beggar, and exhorted the rich to extend their charity to the poor: but it is peculiar to the humanity of England, to have made their support a matter of obligation and necessity on the more wealthy.

As for the punishment of beggars, laws of rigour may be made against them; but what man of common feelings for his fellow creature can order him, who intreats his alms, to be lashed with stripes, when, perhaps, he may really want the pittance he implores [z]!

The English seem to be confessedly the first nation of Europe in science, arts, and arms; they likewise are possessed of the freest and most perfect of constitutions, and the blessings consequential to that freedom. If virtues in an individual are sometimes supposed to be rewarded in this world, I do not think it too presumptuous to suppose, that national virtues may likewise meet with their reward. England hath, to its peculiar honour, not only made their poor free, but

[z] This relates to the laws of other parts of Europe, which punish the beggar with stripes, at the same time that no certain provision is made for him: I have before observed, that a foreigner may still want our alms, as he belongs to no parish, which is obliged to support him.

hath provided a certain and solid establishment to prevent their necessities and indigence, when they arise from what the law calls *The act of God*; and are not these beneficent and humane attentions to the miseries of our fellow creatures, the first of those poor pleas which we are capable of offering, in behalf of our imperfections, to an all-wise and merciful Creator?

This statute of the last year of Queen Elizabeth is the only law which I have had occasion to remark upon: her reign is known to have lasted near half a century; and during this time many acts of parliament passed, which still continue in force.

She was undoubtedly a woman of a strong understanding, and most uncontrollable spirit; the proper exertion of which, upon the apprehension of the Spanish armada, infinitely endeared her to her people: upon most other occasions, however, she was the true daughter of Henry the Eighth, and carried the prerogative of the crown to such extent, as, possibly, involved Charles the First in those misfortunes, which have rendered his reign the most interesting and melancholy period in history.

I have perused her laws with attention; and, except the statute to prevent fraudulent conveyances, I do not find any other of very great importance. The statute of the fourteenth of Elizabeth, which relates to the poor, was a very hard and oppressive law; and as for that of the forty-third, which I have presumed to commend so highly, it can hardly be ascribed to the dictates of her humanity, as she seems to have doated, from old age and infirmities, in this last year of her reign.

STATUTES

STATUTES made secundo, vulgo primo,

JACOBI Regis.

A. D. 1604.

THE statutes from the beginning of the reign of Edward the Sixth, instead of being divided into chapters, to which only one title is prefixed, are printed as distinct laws, and with separate and peculiar titles to each [a]. The 8th chapter of this session of parliament is entitled, *An act to take away the benefit of clergy from some kind of manslaughter*, commonly known by the name of *The stabbing act*, and recites, "that stabbing and killing men on the sudden done and committed by many inhuman and wicked persons, in the time of their rage, drunkenness, hidden displeasure, or other passion of the mind, must be restrained, &c."

This statute is very obscurely penned, and may be pronounced not to have been drawn by any very able crown-lawyer [b]. It is said in *Keeling* to have been intended to prevent a notion, which at this time prevailed amongst juries, that *offensive words given* might make a stab, in resentment for such injury, *only manslaughter*; and the statute (*by it's title at least*) determines such a stab in consequence of rage, drunkenness [c], hidden displeasure, or other passion of mind, to

[a] There are indeed some still more early instances of this in the Statute-book.

[b] There is a proviso, that the statute shall not extend to any person who shall kill another *se defendendo*, or by misfortune: these cases do not stand in need of any such exception, and cannot possibly come within the penalties of any law. There is another act of this reign, which shews very great ignorance of the common law, though one should imagine that no one but a lawyer could have proposed the bill, I mean the 7 James I. ch. xii. which declares, that a tradesman's-books shall not be evidence for him, which never could have been allowed to be evidence in any court of law, if no such declaratory statute had passed. I should suppose, that 5 Eliz. ch. vi. (which is printed at length by Rastall) might have occasioned this law. The title of it is, "An act against such as shall sell any ware for apparel *without ready money*." This law only continued in force till the end of that parliament of Queen Elizabeth.

[c] Drunkenness, by 4 James I. ch. v. is again recited to be the cause of such stabs, as well as other misdemeanors.

amount to no greater offence. I should hardly conceive, however, that any jury, or judge of the time, would have held a stab given by a drunken person, or from hidden displeasure, to be any thing else in the eye of the law but a murder; and therefore I cannot suppose that the reason assigned by *Keiling* for the making of this statute was the true one.

I should rather imagine (as is supposed by some) that it arose from the great enmities and quarrels which subsisted at this time, between the *English* and *Scots*, who had followed James the First in shoals on his accession to the crown: the Scots were, in reality, foreigners, and consequently not acquainted with our laws, which this statute is, therefore, declaratory of [d].

What is here conjectured, seems to receive a confirmation, as stabbing is the great object of this statute, to which the English never were addicted, nor carried about them a proper weapon for: they provoked the Scots, however, by their taunts and reflections, who made use of their *dirks*, which I apprehend to be a kind of poinard. These quarrels frequently ended both in stabs and duels, as Philip the Second had, during his short stay in this country, introduced the Spanish puntillo [e], which appears by the plays of this time, and particularly, *Every Man in his Humour*.

The 11th chapter is entitled, *An act to restrain all persons from marriage, until their former husbands be dead*, and makes the offence felony.

The king of Prussia hath the following ill-grounded observation upon the statute. “ Il y avoit une loi en Angleterre, “ qui defendoit la bigamie; un homme fut accuse d’avoir cin- “ que femmes, et comme la loi ne s’expliquoit pas sur ce cas, “ et qu’on l’interprete litteralement, il fut mis hors de cour,

[d] I have before observed, that, by the *Civil Law*, as well as the *Law of Scotland*, there is no such offence as what is with us termed *Man-slaught*: the Scots, therefore, might have apprehended, that, if not convicted of *Murder*, they should have been acquitted.

[e] Amongst Sir Philip Sydney's Sonnets, published at the end of his *Arcadia*, there is one to the tune of the Spanish Song, *Se tu, Sennora, no duelas de mi*; which shews, that this Spanish Song was a favourite and well-known air in England at that time; so that the Spanish language, as well as manners, had been to a certain degree introduced, at least in the neighbourhood of the court.

"et de proces [*f*]." This mistake of the *royal writer's* probably arose from his having heard, that, it being made felony by an act of parliament to steal *horses*, it was doubted whether the stealing *one horse only* was within the statute: but though, in the construction of a penal law, the less number may not be included under the greater, yet the reverse never can follow in the construction of any kind of law.

The criminal convicted of this offence is entitled to his benefit of clergy, which many have thought he little deserves. By the law of *Denmark* the crime is capital, as it is also by that of *Spain*; which legitimates the children, if the woman is ignorant of the husband's former marriage: In *Portugal*, however, it should seem, that it is an offence of ecclesiastical consueance only, as by the list of criminals, who were punished at the last Auto de Fe in October 1765, there are no less than seven convicts for this crime, who are sentenced to the galleys for five years.

[*f*] *Raisons d'établir ou d'abroger les loix*, p. 396.

Twenty First of JAMES I.

Ch. xxvii. A. D. 1623.

THE title of this statute is, *An act to prevent the destroying and murdering of bastard children.*

This hath by many been considered as a law of severity, as it substitutes presumption of guilt, in the room of actual proof against the criminal. I should conceive that it arose from the difficulty of proving the offence against the mother, rather than an intention to make the bare concealment (arising from a mistaking shame) amount to a capital felony. I conclude it must have frequently happened in these prosecutions, that the child being found dead (perhaps in the mother's room) she insisted upon its having been born in that state, of which no witness being able to prove the contrary, she was of course acquitted [g]. If the dead child, however, was found with any apparent marks of violence upon it, I should apprehend that this, with other circumstances, might have proved the guilt, even at common law, without the intervention of this statute; and I then rather mention this, as I should think, no execution should be permitted, unless the criminal, convicted under this act, would have been guilty of murder by the common law, as she is otherwise to suffer merely from the presumption arising from the circumstance of concealment, of which it is believed there is no other instance in the English law. If this presumption is by the statute made the offence itself, should it not be encountered by another natural, and most strong presumption in favour of the criminal? viz. that the mother cannot be supposed to be the wilful author of the death of her new-born child, which by its cries entreats her protection

[g] The experiment of trying whether the lungs of the dead child will float in water, is generally admitted as evidence in these trials. There is certainly ingenuity in the experiment, and arguments very properly deducible from it in a matter of less importance than the life of a criminal. It appears by the Sessions Papers, however, that surgeons have differed in opinion with regard to this point.

and support; and the father of which she is probably as fond of, as if she had a right to call him by the name of *husband*? and are not children born dead every day? or may not the mother, in the agonies of childbirth, be the involuntary occasion of the infant's death? As for the circumstance of disposing of the body in places proper for its concealment, if the death is not received from the hands of the mother, it is but a natural consequence of endeavouring to continue to bear a good character in her neighbourhood.

It must be admitted, however, that by the laws of some other parts of Europe, the same presumption from concealing the approaching birth, is made the offence itself, and punished capitally. By the Danish and Swedish law, "*Mulier impudica, quæ ex illegitimo concubitu uterum gestat, nec hoc ante partum aperit, latebras quærens quo furtim enitatur partum, et deinde abscondit, percutiatur securi, et in pegmate comburatur, non attento prætextu, mortuum, vel ante justum terminum editum fuisse [b]:*"

"*Fermina quæ per inpuclitiam prægnans fuerit, et partum celaverit, nec usitata remedia quæ sibi et partui salutaria sunt adhibuerit, partum qui non ostenditur, aut exanimis prodiisse dicitur, consulto interfecisse præsumitur [i].*"

[b] Leg. Suec. de Crim. ch. xvi.

[i] Leg. Dan. lib. vi. ch. vi. art. 9. Since the former edition, I have had the honour of a communication from a learned judge, whose name it would have been my highest ambition to have been permitted to mention, that there is an edict of Henry the Second of France, in the year 1556, to the same purport: "*Ordonnons, que toute femme qui se trouvera avoir cele, couvert, et occulté tant sa grossesse que son enfantement, sans avoir déclaré l'un, ou l'autre, et avoir pris suffisans temoignages de la vie, ou mort de son enfant lors de l'issue de son ventre, et apres se trouve l'enfant prive du bapteme, et de sepulture publique, et accoutumée, soit telle femme tenue réputée avoir homicide soit enfant, et pour reparation punie de mort, et du dernier supplice, et de telles rigueurs que le cas le méritera.*" Institutes Crim. par. Vouglans, Paris, 1757, 4to p. 532. I have likewise happened to see a long Edict published by the king of Prussia at Berlin, in 1765, with regard to the murder of bastard children by their mothers, and by which it should seem that he is endeavouring to repair the depopulation of his country by the last war. The regulations are very minute and particular, and I shall only mention the conclusion: "*Enfin pour engager d'au tant mieux les personnes tombées en faute a déclarer librement leurs grossesses, selon le teneur du present Edict, et pour prevenir par la de plus grands maux encore. Nous levons, et abolissons en meme tems toutes les peines de quelque ordre qu'elles soient, qui ont eu lieu jusqu'ici, contre celles dont il s'agit; les déclarons a l'abri de tout châtiment, et voulons qu'elles ne soient pas même exposées au moindre reproche, ou a la plus légère flétrissure pour la faute commise.*"

The destroying of the infant by procuring an abortion is a crime which bears a great affinity to this, and is made capital by many laws, though not by that of England [k]. "Cicero, "in oratione pro Cluentio, scripsit Milefiam quandam mulierem, cum esset in Asia, quod ab hæredibus secundis, pecunia accepta partum abegisset, rei capitalis esse damnatam [l], and it is likewise asserted (in the comment on the *Coustume reformée de Normandie*) that this crime is punished capitally in most parts of Europe [m].

James the First affected to be styled and thought the *Solomon* of his age [n]; he therefore had a particular attention to the laws which were enacted during his reign.

In his youth, when he went to Denmark, in order to bring back his queen [o], it appears (by his own works) that he spent more time in the Danish courts of justice [p], than in attending upon his destined consort.

After this, when he became king of England, he had frequent conferences with Sir Edward Coke, and other eminent

[k] It should seem however to have been a capital offence in the time of Bracton: "Si sit aliquis qui mulierem prægnantem percusserit, vel ei venenum dederit, per quod fecerit abortivum; si puerperium jam formatum, vel animatum fuerit, facit homicidium." Possibly however Bracton only lays this down from the Roman law (which is not uncommon with him), and by which (according to the citation from the Digests) it is made capital.

[l] Dig. 48, 19, 89, de partu abacto.

[m] Vol. i. p. 35. Collier, in his *Ecclesiastical History*, mentions a canon, in the time of Edgar, by which a woman who murdered her child, or procured abortion, was obliged to do penance by a ten years fast. Vol. i. p. 188.

[n] Lord Bacon mentions this king's having said in a great cause of judicature: "That sovereigns ruled by their laws, as God did by the laws of nature, and ought as rarely to put in use their supreme prerogative, as God does his power of working miracles." If the comparison of a finite and infinite Being is not here thought too presumptuous, perhaps no more noble thought was ever delivered by either king or magistrate. Bacon de Augm. Scient. vol. i. p. 97. edit. of 1765, 4to.

[o] This expedition of the king's to Denmark probably occasioned his son's more extraordinary journey to Spain for the same purpose; and James could not (with this precedent) well refuse his assent: there is a record in Rymer, which provides a regency during his absence in Denmark.

[p] The Danish law was at this time comprehended in one code; and therefore it is not improbable that he might have perused it with attention; and it is remarkable that three of the laws of this reign for the punishment of criminals agree exactly with the Danish laws, on the same head. His desire of being instructed in the English law, and having had conferences thereon, is recited in the preamble to a patent by which he appointed two law reporters in the year 1617, and with a salary of 100 l. per ann. Rymer, vol. vii. part iii. p. 19.

lawyers,

lawyers, on the subject of the English law, and wanted much to preside in the King's Bench: though Sir Edward Coke prevented this for the most part; yet, if we may believe Rushworth, he actually did preside in the cause of Sir Thomas Lake, and Lady Exeter [q].

Besides this, we find in each of his speeches to parliament (which are known to be his own compositions) that he dwells much upon the laws which he would recommend to their consideration; he therefore not only attended to the statutes of his reign, but, in all probability, many of them might take their first rise from his commands to his ministers. Some laws passed, which deserve much to be enforced [r]; nor do I find any one which hath the least tendency to extend the prerogative, or abridge the liberties and rights of his subjects; a negative merit in a king, which deserves to be set against many positive ones. It is at present a sort of fashion to suppose, that this king, because he was a pedant, had no real understanding, or merits: now pedantry is only comparative, and Mr. Hume very fairly compares the speeches of the king with those of the speaker in every session of parliament, and with justice gives the preference to those of the king [s]. The same observation may be made between the bishop who writes the prefatory discourse to the king's works, and the works themselves, and equally to the king's advantage, if it is not supposed that the bishop (like a good courtier) under-wrote himself.

What hath greatly tended to his character's having been considered in so low a light, is the notion which prevails, that he had not any martial spirit: I cannot say indeed that I have met with any proofs of his being a man of resolution;

[q] Rushw. vol. i. p. 473.

[r] 2 James I. ch. xxiii. xxv. xxxi. 3 James I. ch. xviii. which is the act for bringing the New River to the city of London; and the king himself had contributed liberally to this undertaking. 4 James I. ch. i. as also many acts to prevent the increase of popery; and lastly the twenty-first of James the First, to prevent monopolies, which the preamble recites the king himself to have published a treatise full of zeal and warmth against, in order to suppress this growing evil.

[s] In the proceedings of the House of Commons, for the year 1620, (published from a manuscript in the library of Queen's College, Oxford) there is the king's speech for that year to his parliament, which is followed by that of Lord Bacon (then Viscount St. Albans and Chancellor) which seems to be more vitious in the eloquence of it (if it may deserve such a name) than that of the king's.

but as for his declining the *Palatine* war, (which he is generally so much condemned for) he seems to deserve the highest praises and commendation from a nation of Islanders. He by this prudent caution prevented our being involved in a most unnecessary expence, which he would have incurred, however, without the least danger to himself in person, and consequently cannot, from thence, merit the imputation, of either pusillanimity, or cowardice [1].

[1] I cannot however go so far in commendation of the virtues of this king, as Mr. Thomas Ross, in his dedication to James the First, "Non sum nescius, princeps omnium quotquot sunt, fuerunt, aut erunt, nisi fallunt fata, longe maxime, et (velint, nolint) omnium optime." De Jacobi virtutibus enarratio 1608 Londini.



A P P E N -

A P P E N D I X,

B E I N G

A Propofal for new modelling the Statutes.

A P P E N D I X

A Proposal for new modelling the Statutes

A P P E N D I X.

TH E reformation of the law hath generally been an object, and often the chief glory, of good and great reigns; it is not, therefore, to be doubted, but that under the present auspicious one, which hath begun by an act recommended from the throne itself [a], to perpetuate to this nation the most pure and upright administration of justice, this great object will be, sooner or later, attended to.

It is not, however, proposed by the term *reformation*, that there should be a new arrangement and institute of the whole body of the law, as in the time of *Justinian*, or a *Code Frederique*, which is not practicable in this country, where every alteration must have the sanction of parliament; nor, were it practicable, would the proposer presume to alter what is founded in the deepest wisdom.

Those who ridicule the law of England can never have been witnesses of that constant, deliberate, and upright administration of justice, which hath prevailed in the different courts of this kingdom since the Revolution, and that upon the most solid and rational principles.

Will it be said, that the law is uncertain, when there is hardly a difference of opinion between the judges of the courts at Westminster upon the variety of points, that come before them from year to year, and how few writs of error are brought from their judgments, but for the purpose of delay?

[a] 1 Geo. III. cap. xxiii. It appears by the Calendar of the Journals of the House of Lords, that, in the year 1691, the king refused his assent to a bill for ascertaining the commissions and salaries of the judges; there was a clause inserted in this bill, that the judges should be subject to actions for corrupt judgment; but their being removed upon address of both houses of parliament, was thought a more proper check and restriction by 12 and 13 William III. ch. ii.

If this uncertainty is not to be objected to the courts of common law, as little can it be objected to the courts of equity : near twenty years of well-considered decrees, made by the same most consummate lawyer without reversal, have now established so clear, consistent, and beneficial a system of equity, that ignorance only can reproach it with being *jus vagum aut incognitum*.

As the object of every court of justice, since the Revolution, hath been invariably the same, viz. an honest and impartial decision, certainly in the law must be a necessary consequence [b]. It is in other countries, where judges have decided (occasionally at least) from self-interested motives, that uncertainty and fluctuation of opinions hath arisen, and must necessarily arise; but in this island, the common-place epigram, or satire upon bribing a judge, would lose its sting, as even he against whom the cause is decided, though he may disapprove the determination, yet never even suspects the integrity of the magistrate.

But the law of England is said to be a law of delay : it is difficult to answer a charge of so general a nature ; but to which of the common law-courts can this be objected ? It is believed that there are no arrears of business in any one of them ; and in the King's Bench, where some years ago this objection might have been made with propriety, no suitor ever waits beyond the ensuing term, and then receives a decision not only satisfactory to the disputant parties, but which, from its cogent and irresistible force, must not only settle the point then in question, but remain a kind of law land-mark to the latest posterity.

But Chancery causes have remained undecided for twenty years and upwards. This must be admitted to have sometimes happened, but cannot be prevented by any new rules of court, or alteration of the practice : when causes have been so long depending, it almost always hath arisen by the frequent deaths of parties to the suit ; and natural justice requires, that those

[b] It is remarkable, in the Reports of Cases determined soon after the Revolution, that the judges continually differed in opinion : the reason seems obvious, that the law was not then fixed by a long course of rational and unbiassed decisions.

[c] Besides this, what are generally called delays, are absolutely essential to the liberties of a free country.

who become interested by such an event, and were not so before, should have an opportunity of defending their right.

When a cause is once brought to a hearing, nothing can be more expeditious; the Lord Chancellor or Master of the Rolls sits five or six hours in court most days of the year, and nineteen causes out of twenty receive an immediate determination [d],

Thus much hath been said to obviate the objection, that, if any reformation of the law is designed, it should be of the most extensive nature.

The reformation of the Code of statutes, however so far as to repeal obsolete [d], and sometimes dangerous laws, as well as the reducing the different acts of parliament, which relate to the same subject, into one consistent statute, would be a salutary, nay, is almost become a necessary work [e].

To prove, that some acts of parliament (which fortunately, for the most part, lie buried in the Statute Book, till the spleen and resentment of individuals calls them forth, to the disgrace of the law, and the distress of the person prosecuted) are really detrimental and dangerous; three or four out of an immense number, need only be mentioned. It is felony [f] by 8 Eliz. ch. iii. to carry live sheep out of the kingdom; and there is no exception of the stock, which is necessary for the fresh provisions of a ship's company: upon such an indictment, in-

[d] It may be said, that an obsolete statute, from which no bad consequences have arisen, should not be repealed, as it may occasionally be of use to the historian and the lawyer. This objection would prove, that most of the acts contained in Rastal should have continued unrepealed; and a sufficient number of that edition of the statutes remains for the above purposes: besides, every useless obsolete statute, in some measure, takes away from the reverence which is due to those which are more frequently enforced. Lord Bacon therefore (in the 57th Aphorism, *De augmentis scientiarum*) compares the intermixing obsolete statutes, in the same Code with those which may be enforced, to *Mezentius's* fastening dead bodies to the living, "*adeo ut leges vivæ, in complexu mortuorum, perimantur.*" An opportunity cannot be here omitted of mentioning, that a judicious collection of proposed and rejected acts would have its use.

[e] This is strongly recommended by the preamble to 5 Eliz. ch. iv. It appears by Lord Bacon's Works, that by order of James the First, Lord Chief Justice Hobart, Mr. Serjeant Finch, Mr. Heneage Finch, Mr. Noye, Mr. Hackwell, and Lord Bacon himself, were employed for a considerable time in this very work, and that they had made some progress in it. I the rather mention these great names, that no lawyer may think such a complement derogatory, or below his dignity.

[f] It is only felony for the second offence; but the first is punished with imprisonment, and loss of the left hand.

deed,

deed, both judge and jury would probably unite in preventing a conviction, but the criminal may be obnoxious to the jury; and, at all events, such a prosecution should not be suffered.

By 25 Henry VIII. ch. xiii. (during whose reign there are many acts which should be repealed, as they then began to make regulations relative to trade and agriculture, without understanding the true principles by which they may be promoted) it is made penal to keep above 2000 sheep. The greatest part of most of the Welsh counties, and perhaps some of the English, are fit for nothing else, nor can profitably be converted to arable; and yet there was an indictment in *Cardiganshire* within these six years upon this obsolete and injudicious statute [g].

It is submitted, that the laws of queen Elizabeth, which enforce the going to church under penalties (our present rational religion does not want the aid of such regulations) should be repealed. A son prosecuted his mother upon these acts within these eight years [b]; and it may almost be said, that no man of business can go through life, without subjecting himself to many prosecutions, when, at the same time, he was not conscious of having offended against any law whatsoever [i].

Sir *William Young*, fifteen or sixteen years ago, moved for a committee of the House of Commons for this very purpose, of which he was himself the chairman: it is believed however, that nothing material was done, or resolved upon.

[g] By 2 and 3 of Philip and Mary, ch. iii. for every six score sheep, a milch cow and calf is to be reared every year, under penalties; there is scarcely a farmer or landholder in the kingdom, who is not, perhaps, liable to a prosecution on this statute.

[b] I have likewise been informed, that there was, not many years ago, an indictment at the quarter sessions in Somersetshire, on 6 Edw. VI. ch. iv. which punishes striking in a church-yard with the loss of ears, and which, at the time it was enacted, was intended to prevent the dangerous riots and disputes between the papists and protestants, upon the first establishment of the Reformation.

[i] It may be proper likewise to mention some instances (out of many) of a statute most absurdly placed, where no one could expect to find such a law: a most material alteration, in the statute of distributions, is inserted in the 1 Jac. II. c. xvii. entitled, *An Act for the reviving and continuing the several acts therein mentioned*; and by 20 Geo. II. ch. xxii. for explaining the *Window-Tax act*, there is a clause, that all laws, which were then in force, or which should hereafter be enacted, are to extend to Wales and Berwick, though not particularly mentioned.

This was possibly owing to its being a work of time and deliberation, which the flux body of a committee [k], sitting from year to year, is not at all calculated for; the assistance of lawyers was likewise probably wanting: those barristers, who are members of the House of Commons, have generally too much business in their profession to spare time for such an attendance; and without such assistance the committee could not well proceed.

As this obstacle must for ever continue to this great work being done by a committee of parliament solely, it is proposed that two or more serjeants, or barristers should be appointed, who, from year to year, might make a report to the privy council, as likewise to the lord chancellor, the master of the rolls, and the twelve judges, of a certain number of statutes [l], which should either be repealed, or reduced into one consistent act; and send as a schedule, annexed to such report, a copy of such proposed statute on or before the last day of every Trinity Term; there will then be the whole vacation for the consideration of such intended alterations; and if they should be approved of, they might pass into laws the subsequent session of parliament.

The good consequences of such a reformation of the law need not be dwelt upon, as the Statute-Book would be reduced to half its present size, and the subject better know the law he is to be governed by. It is indeed much to be feared, that the complaint (which Sir *George Mackenzie* makes in the introduction to his observations upon the Scotch Statutes) may be applicable to our own: after having mentioned the *ardent desire* of the Scotch parliament for the amending their laws, he says, that one of his chief inducements for writing on that subject was, that, though a lawyer, he found a difficulty in understanding the Statutes, which were the *pillars of the law*.

[k] See an account of such a committee Deb. H. C. 1620, vol. i. p. 38. By 27 Hen. VIII. ch. xv. (which statute is printed at length by Rastal) the king is empowered to appoint commissioners for the reformation of the canon law.

[l] If too many are inserted in the report, they will not be properly considered; and Trebonianus is much condemned by the writers on the Civil Law, who, when Justinian had allowed him and his assistants ten years for compiling the *Pandects*, from a too great desire of dispatch, published the collection in three years. Duck. de Auth. Jur. Civ.

It was partly owing to its being a work of the same
character, with the first book of the series, that
it was not so successful in the market. The
lawyer was known to be writing the book, and
the public were not so much interested in
the subject as they were in the first book. The
author, and without any assistance the book was
not well received.

...the object of the bill for ever continuing in this great work...

[illegible][illegible]

I N D E X

O F T H E

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